No. 16,767

FILED
APR 28 1967
JOHN F. DAVIS, CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - Appellant

versus

HOMER O. and DOROTHY CORRELL - Appellees

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

JOINT APPENDIX

RICHARD M. ROBERTS
Acting Assistant Attorney General

MEYER ROTHWACKS
EDWARD L. ROGERS
Attorneys
Department of Justice
Washington, D.C. 20530

Of Counsel:
JOHN H. REDDY
United States Attorney

G. WILSON HORDE
Assistant United States Attorney

FILED
NOV 12 1965
CARL W. REUSS, Clerk

WILLIAM L. TAYLOR, JR.
SWAFFORD & TAYLOR
Ninth Floor, Maclellan Building
Chattanooga, Tennessee 37402

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY. 9-9-65-50

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 113

UNITED STATES, PETITIONER

vs.

HOMER O. CORRELL, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civil Action No. 5089

HOMER O. and Wife, DOROTHY CORRELL, - *Plaintiffs*

v.

UNITED STATES OF AMERICA - - - *Defendant*

For plaintiff:
Swafford, Jahn & Taylor
Ninth Floor, Maclellan Building
Chattanooga, Tennessee

For defendant:
J. H. Reddy

DOCKET ENTRIES

1964

Aug. 24 —Complaint filed.

Aug. 24 —Summons issued and handed to U. S. Marshal.

Aug. 25 —Summons returned executed as to the United States by serving copy on David E. Smith Asst. U. S. Attorney for the eastern District of Tennessee as Knoxville and mailed by certified mail three copies to the Attorney General, Washington, D. C. on August 24, 1964, and filed.

Oct. 16 —Answer of defendant, United States of America, filed. Copy served by Attorney.

Docket Entries

1965

Jan. 18 —Trial Brief of Defendant, filed. Copy served by Attorney.

Jan. 19 —Brief for the Plaintiffs filed. Copy served by attorney.

Jan. 20 —Discovery Deposition of Homer O. Correll & William C. Hale, filed. Notice to Attorneys by Clerk.

Jan. 21 —Order pursuant to Pre-Trial, filed. Copies to attorneys by Clerk.

Jan. 21 —Order amending Pre-Trial Order, entered in Civil Order Book 31, page 143, and filed. Copies to attorneys by Clerk.

Jan. 25 —Defendant's motion for directed verdict, filed. Copy served by attorney.

Jan. 25 —Plaintiffs' requested jury instructions No. 1 through No. 6, filed.

Jan. 25 —Order of trial to the jury: Plaintiffs' evidence heard, defendant rested without the introduction of any evidence, the defendant moved the Court for a directed verdict which motion was overruled, argument of counsel, charge of the Court, verdict in favor of the plaintiffs and against the defendant. Attorneys to prepare judgment in this case, entered in Civil Order Book 31, page 152, and filed.

Jan. 25 —Exhibits, filed.

Jan. 29 —Motion of defendant for Judgment notwithstanding the Verdict filed. Copy served by U. S. Attorney.

Feb. 9 —Order overruling defendant's motion for judgment notwithstanding the Verdict, entered in Civil Order Book 31, page 201, and filed. Copies to attorneys by Clerk.

1965

March 30—Agreed Judgment that plaintiff recover of defendant $93.20 for year 1960, plus deficiency interest of $17.24; and $97.85 for year 1961, plus interest of $12.23, together with interest on each amount at 6% per annum, entered in Civil Order Book 32, page 137, and filed.

Off the Docket

May 26 —Notice of Appeal filed. Copy served U. S. Attorney and by Clerk.

June 23 —Order extending time for filing record and docketing appeal entered in Civil Order Book 33, page 98, & filed. Copies to attorneys by Clerk.

Aug. 12 —Transcript of Testimony, filed.

Aug. 13 —Certified record on appeal mailed to Clerk, U. S. Court of Appeals, Cincinnati, Ohio.

Attest:
A true copy
Certified this Aug. 13, 1965
Karl D. Saulpaw, Jr., Clerk
By (s) Mary W. Johnson,
Deputy Clerk

[Caption Omitted]

COMPLAINT

Plaintiffs, Homer O. and wife, Dorothy Correll, of Fulton Road, Fountain City, Knox County, Tennessee, by and through their attorneys, Swafford, Jahn & Taylor, Ninth Floor, Maclellan Building, Chattanooga, Tennessee, present this, their complaint, against the United States of America pursuant to the provisions of Title 28, United States Code,

Section 1346(a)(1), and for cause of action allege as follows:

1. Plaintiff, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman and he and Plaintiff, Dorothy Correll live at Fountain City, Knox County, Tennessee, and have resided there during both of the calendar years 1960 and 1961, the years in question in this action.

2. This is a suit for the recovery of federal income tax (plus interest) erroneously and illegally collected from the Plaintiffs for the calendar years 1960 and 1961 in the following amounts:

Calendar Year	Taxes Claimed	Interest	Form 843 Exhibit No.	Total
1960	93.20	17.24	A	110.44
1961	97.85	12.23	B	110.08
Total	191.05	29.47		220.52

3. Plaintiffs, for the calendar years 1960 and 1961, filed a U. S. Individual Income Tax Return with the District Director of Internal Revenue at Nashvile, Tennessee.

4. That Homer O. Correll has been employed by Hale Brothers, Inc. over a period of several years as a salesman with assigned selling routes which regularly require his traveling away from the immediate vicinity of his home at Fountain City, Tennessee.

5. That in order for Mr. Correll to discharge his duties it was and is necessary for him to leave his home at very early hours in the morning. That these departures are made before his wife and family are awake and, therefore, of necessity, Mr. Correll must eat his morning meals at places on his routes.

6. That in the regular course of his business activities, Homer O. Correll incurred certain other expenses which are ordinary and necessary to his business and which together

with the meals eaten away from home (Paragraph 5 hereof) are reimbursed to him by his employer on an itemized accountable basis.

7. In the normal course of business the Defendant, by its duly authorized agents caused an examination of the Plaintiffs' U. S. Individual Income Tax Returns for the years 1960 and 1961. As a result of such examination the Defendant has made certain adjustments to the taxable income of said Plaintiffs which specific adjustments are as follows:

Item	1960	1961
Additional income from reimbursed expenses of employer.....	465.97	489.23

8. The Defendant has asserted that the amount of reimbursements made by Hale Brothers, Inc. to Plaintiff, Homer O. Correll, represents taxable income to him and that Plaintiff is not entitled to a business deduction for such expenses so incurred.

9. That as a direct result of the investigation of the Plaintiffs' U. S. Individual Income Tax Returns, additional taxes as set forth in Paragraph 2 above were assessed against and paid by the Plaintiffs under protest on May 20, 1964, the tax year 1960 having remained open for the assessment of tax under an agreement of the taxpayers with the Internal Revenue Service until June 30, 1965. Subsequently, the Plaintiffs filed a claim for refund (true copies of which are Forms 843 attached hereto as Exhibits A and B) for each of said years seeking a refund of such amounts. Said claims for refund were duly considered by the District Director of Internal Revenue, Nashville, Tennessee, and disallowed under date of June 19, 1964. The Plaintiffs received statutory notices of disallowance of claims by certified mail true and correct copies of said certi-

fied notices being attached hereto as Exhibits C and D. The aforesaid notices of disallowance or rejection were mailed to the Plaintiffs as required by Title 26, United States Code, Section 6532(a)(1).

10. Plaintiffs allege that the reimbursements in the amounts paid to Homer O. Correll during the years in question were reimbursements for ordinary and necessary business expenses incurred by Homer O. Correll or for the convenience of the employer and were reasonable in amounts. As such, the expenses would be deductible on his U. S. Individual Income Tax Returns in the same amount as the amount of the reimbursements thereby causing no adjustment to taxable income for either of the years in question, or would be excludable from gross income as expenses incurred by the employer for its convenience. Therefore, the additional income asserted by the Defendant is erroneous, is not according to law and such that such additional deductions should have been allowed under the Internal Revenue Code of 1954 as amended.

11. Plaintiffs are therefore entitled to recover from the United States of America the said sum of Two Hundred Twenty Dollars and Fifty-Two Cents ($220.52) plus interest as required by law and for such other and further relief as the court may deem proper. Plaintiffs demand a jury try this issue when joined.

(s) Homer O. Correll
(s) Dorothy Correll

(s) Carl A. Swafford
(s) Richard O. Jahn
(s) William L. Taylor, Jr.
Attorneys for Plaintiffs

Ninth Floor, Maclellan Building
Chattanooga Tennessee

Complaint

State of Tennessee }
County of Hamblen }

Homer O. Correll and Dorothy Correll, being first duly sworn, upon oath depose and say that they are the Plaintiffs named in the foregoing complaint subscribed by them, and that they have read the complaint, and that the statements contained therein are true to the best of their knowledge, information and belief.

Subscribed and sworn to before me this the 20th day of August, 1964.

My commission expires January 15, 1965.

(s) H. J. Reiland
Notary Public

EXHIBIT A

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 843
(Rev. Mar. 1960)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

District Director's Stamp
(Date received)

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps Homer O. and Dorothy Correll

Number and street Fulton Road
City, town, postal zone, State Fountain City, Tennessee

Fill in applicable items—Attach letter size sheets if space is not sufficient.

1. Social security number 411-05-7605
3. District in which return (if any) was filed Nashville, Tennessee
5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From January 1, 1960, To December 31, 1960.
6. Kind of tax Income Tax
7. Amount of assessment $110.44
   Dates of payment May 20, 1964
9. Amount to be refunded $110.44
11. The claimant believes that this claim should be allowed for the following reasons:

See Rider Attached

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated May 26, 1964

(s) Homer O. Correll
(s) Dorothy Correll

Complaint· Exhibit A

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer identification number, if any of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax witheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Complaint Exhibit A

RIDER TO CLAIM FOR REFUND
Homer O. and Dorothy Correll
1960

Taxpayer, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman. In the performance of his duties, he is required to incur certain expenses in a travel status which are reimbursed to him on an accountable basis by his employer. These expenses are frequently not incurred by taxpayer while away from home over night but are ordinary and necessary business expenses to the carrying out of his business duties and are incurred for the convenience of the employer. As a result of such expenditures the District Director of Internal Revnue has caused an additional $465.97 in income to be taxed to taxpayers resulting in additional tax of $93.20 and interest of $17.24 for a total of $110.44. The District Director asserts such $465.97 to be personal expenses of taxpayer, Homer O. Correll, and not the reimbursement of business expenses.

The additional tax plus interest has been paid in full by taxpayers under protest. Consequently, a claim for refund is hereby made in the amount of $110.44, plus interest, or such other amounts as may be determined to be due by law.

EXHIBIT B

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

FORM 843
(Rev. Mar. 1960)

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ REFUND OF TAXES ILLEGALLY, ERRONEOUSLY, OR EXCESSIVELY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

District Director's Stamp
(Date received)

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps Homer O. and Dorothy Correll

Number and street Fulton Road
City, town, postal zone, State Fountain City, Tennessee

Fill in applicable items—Attach letter size sheets if space is not sufficient.

1. Social security number 411-05-7605
3. District in which return (if any) was filed Nashville, Tennessee
5. Period—if for tax reported on annual basis, prepare separate form for each taxable year From January 1, 1961, To December 31, 1961
6. Kind of tax Income Tax
7. Amount of assessment $110.08
   Dates of payment May 20, 1964
9. Amount to be refunded $110.08
11. The claimant believes that this claim should be allowed for the following reasons:

See Rider Attached

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated May 26, 1964

(s) Homer O. Correll
(s) Dorothy Correll

Complaint Exhibit B

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, enter social security and employer identification number, if any of both husband and wife and each must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

6. If claim is for excess social security (F.I.C.A.) tax witheld as a result of having had more than one employer, include the names and addresses of your employers, and the amount of wages received and taxes withheld by each as part of your explanation in item 11. Do not claim tax withheld if you have claimed the excess withholding on your individual income tax return.

Complaint Exhibit B

RIDER TO CLAIM FOR REFUND
Homer O. and Dorothy Correll
1961

Taxpayer, Homer O. Correll, is employed by Hale Brothers, Inc. as a salesman. In the performance of his duties, he is required to incur certain expenses in a travel status which are reimbursed to him on an accountable basis by his employer. These expenses are frequently not incurred by taxpayer while away from home over night but are ordinary and necessary business expenses to the carrying out of his business duties and are incurred for the convenience of the employer. As a result of such expenditures the District Director of Internal Revnue has caused an additional $489.23 in income to be taxed to taxpayers resulting in additional tax of $97.85 and interest of $12.23 for a total of $110.08. The District Director asserts such $489.23 to be personal expenses of taxpayer, Homer O. Correll, and not the reimbursement of business expenses.

The additional tax plus interest has been paid in full by taxpayers under protest. Consequently, a claim for refund is hereby made in the amount of $110.08, plus interest, or such other amounts as may be determined to be due by law.

EXHIBIT C

FORM L-60 (4-59)

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Nashville, Tennessee

June 19, 1964

In Reply Refer To
2310

Certified Mail
Homer O. and Dorothy Correll
Fulton Road
Fountain City, Tennessee

In Re: Claim for Refund of
$110.44

For the Period
1960

Dear Mr. and Mrs. Correll:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

(s) James A. O'Hara
District Director

EXHIBIT D

FORM L-60 (4-59)

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Nashville, Tennessee
June 19, 1964

In Reply Refer To
2310

Certified Mail
Homer O. and Dorothy Correll
Fulton Road
Fountain City, Tennessee

In Re: Claim for Refund of
$110.08

For the Period
1961

Dear Mr. and Mrs. Correll:

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

(s) James A. O'Hara
District Director

[Caption Omitted]

ANSWER

The defendant, United States of America, by its attorney, John H. Reddy, United States Attorney for the Eastern District of Tennessee, for his answer to the complaint herein alleges as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2, except denies any taxes were erroneously or illegally collected by defendant.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4.

5. Defendant is presently without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph 5.

6. Admits the allegations in paragraph 6 that the plaintiff was reimbursed by his employer for certain expenses, but defendant is presently without knowledge or information sufficient to enable it to form a belief as to the truth of any further allegations contained in paragraph 6.

7. Admits the allegations contained in paragraph 7.

8. Admits the allegations contained in paragraph 8.

9. Admits the allegations contained in paragraph 9, except alleges that the taxes were paid by plaintiff on May 25, 1964.

10. Denies the allegations contained in paragraph 10.

11. Denies the allegations contained in paragraph 11, except admits plaintiffs are entitled to a jury to try this issue.

Wherefore, the defendant prays that the complaint be dismissed with prejudice and that the defendant be allowed his costs and disbursements.

_____

United States Attorney

CERTIFICATE OF SERVICE

It Is Hereby Certified that service of the foregoing answer has this ____ day of October, 1964, been made on counsel for plaintiffs by depositing a copy thereof postage prepaid, in the United States mail addressed to Swafford, Jahn & Taylor, Ninth Floor, Maclellan Building, Chattanooga, Tennessee.

_____

United States Attorney

[Caption Omitted]

ORDER PURSUANT TO PRE-TRIAL

It is agreed by counsel for the parties and ordered by the Court that this statement will be binding at trial of the case on its merits;

Nature of Action:

Jurisdictional statute, Title 28 U.S.C. Sec. 1346(a)(1). Refund of Federal Income Tax under Title 26 U.S.C. Secs. 119 and 1962.

Theories Upon Which Plaintiffs Expect to Recover:

Plaintiff is a salesman for Hale Brothers Produce Company of Morristown, Tennessee, leaving his home early in the morning and going on his route which takes him some 150 to 200 miles per day away from his home. He eats breakfast after he leaves home before he begins his route, eats lunch on the road and returns to his home every evening, submits the orders to his employer for delivery the next day. He incurs traveling expenses in the course of his work.

Plaintiff says he is entitled to deduct traveling expenses under Section 119, Internal Revenue Code, Title 26, or

Section 162, even though he does not spend overnight away from home.

Plaintiff says that the Hanson case, 298 F. 2d 381 (C. A. 8) is the controlling factor.

Plaintiff says that the Commission has made an arbitrary classification or line of distinction that requires the person to stay away from home during a period of rest or overnight before these expenses of meals are deductible. Plaintiff says these are deductible expenses incurred for the convenience of the employer under Section 119 or ordinary necessary business expenses under Section 162.

Theories Upon Which Defendant Expects to Defeat Recovery:

Government contends that these meal deductions should be included in income, and says that under Section 119 there shall be excluded from gross income the value of any meals and lodgings furnished by an employer on the premises of the employer. Government says this has not been done and that it has not been furnished for the convenience of the employer. Further, they have to be meals in kind rather than money paid to the taxpayer to buy the particular means. Government says these are personal expenses and do not come under Section 162(a)(2) because this is actually traveling away from home that the taxpayer is doing and Section 162 would be the only statute under which this could be deducted from his income. (Magness v. Commissioner, 247 F. 2d 740; Syslope v. Commissioner, 21 Tax Court 131; Charles N. Anderson v. Commissioner, 42 Tax Court 410.)

Issues:

(1) Are these ordinary and necessary business expenses within the definition of Section 162?

(2) Are these expenses incurred by him for the convenience of the employer and thereby reimbursed and not taxable to him?

(3) Whether the means in question are furnished on the business premises of the employer, and if not, whether they would come within Section 119 and if they were not furnished in kind whether Section 119 would be applicable.

Note: Regulations relied on by the Government to be furnished and attached to the pre-trial order.

Note: Parties to file trial briefs on or before January 18, 1965, attaching to the brief suggested charges on the applicable law.

Stipulations:

(1) Parties to exchange names and addresses of witnesses on or before January 18, 1965.

(2) The amounts involved will be stipulated or computed by the parties and neither the Court nor the jury will be concerned about the amount involved.

(3) Counsel for plaintiff to furnish breakdown of the amounts as between lunch and dinner meals.

The parties shall have until trial date within which to except to any part of this order.

Approved for docketing and filing:

_____

United States District Judge

[Caption Omitted]

DEFENDANT'S MOTION FOR DIRECTED VERDICT

The defendant respectfully moves the Court to direct the entry of a verdict in its favor and, as grounds therefor, assigns the following:

Motion for Directed Verdict

1. On the evidence before the Court, the plaintiff, Homer O. Correll, has failed to prove that the meal expenses he incurred were not of a personal nature, as defined by Section 262 of the Internal Revenue Code of 1954.

2. On the evidence before the Court, the plaintiff has failed to prove that his means were furnished to him for the convenience of his employer.

3. The evidence is without dispute that the meals were not furnished to plaintiff on the premises of his employer.

4. The evidence is without dispute that the meals were not furnished in kind to the plaintiff.

5. On the evidence before the Court, the plaintiff has failed to show that he was "away from home," as the term is used in Section 162(a)(2) of the Internal Revenue Code of 1954.

6. Under the evidence in this case, the defendant is entitled to a judgment as a matter of law.

(s) William D. M. Holmes
Attorney
Department of Justice
Washington, D. C. 20530

[Caption Omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The defendant respectfully moves the Court to set aside the verdict of the jury, which was returned on January 25, 1965, and to enter judgment in its favor notwithstanding the verdict and, as grounds therefor, assigns the following:

(1) The verdict is contrary to the evidence adduced at the trial.

(2) The defendant is entitled to a judgment in accordance with its Motion For Directed Verdict, which was filed at the conclusion of the evidence.

Motion for Judgment Notwithstanding the Verdict

(3) The evidence of record shows, without dispute, that plaintiff Homer O. Correll was not "away from home" within the meaning of that term as it is used in Section 162(a)(2) of the Internal Revenue Code of 1954.

In support of this motion, the defendant hereby adopts all arguments which were presented upon the trial of this action and the brief which was submitted to the Court prior to the trial.

John H. Reddy
United States Attorney

By:_____
Assistant United States
Attorney

[Caption Omitted]

ORDER

The Government has moved to set aside the verdict of the jury and to enter a judgment in its favor notwithstanding the verdict upon three grounds, the first of which asserts that the verdict is contrary to the evidence. It is the opinion of the Court that this ground is without merit and is, therefore, overruled.

It is asserted in the second ground that defendant is entitled to a judgment in accordance with its motion for a directed verdict. The Court was of the opinion at the time that it passed on the motion and is still of the opinion that the evidence presented issues of fact for the determination of the jury and there is substantial evidence to support the verdict of the jury.

Ground No. 3 states that plaintiff was not "away from home" within the meaning of that term as used in Section 162(a)(2) of the Internal Revenue Code of 1954. In the opinion of the Court, this ground is lacking in merit and

is overruled. Reference is made to the cases cited by the Court at the time the motion was overruled during the trial.

Enter:

(s) Robt. L. Taylor
United States District Judge

[Caption Omitted]

JUDGMENT

This cause having come on for hearing on January 25, 1965, with a jury to try the facts, and the jury having reached a verdict for the Plaintiff it is, in conformity with the jury findings:

Ordered And Adjudged, that the plaintiff in Civil Action No. 5089 has judgment against defendant for the year 1960 in the principal amount of Ninety-three Dollars and Twenty Cents ($93.20) plus deficiency interest of Seventeen Dollars and Twenty-fourt Cents ($17.24); for the year 1961 in the principal amount of Ninety-seven Dollars and Eighty-five Cents ($97.85) plus deficiency interest of Twelve Dollars and Twenty-three cents ($12.23) together with interest on each of the aforesaid amounts at the rate of six per cent (6%) per annum according to law.

Approved For Entry:

(s) Robt. L. Taylor
United States District Judge

Presented and approved by:

(s) William L. Taylor, Jr.
Attorney for Plaintiff

Approved as to form by:

J. H. Reddy
United States Attorney

By: (s) G. Wilson Horde
Assistant U. S. Attorney

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment entered against it in this cause on March 30, 1965.

J. H. Reddy
United States Attorney
By: (s) G. Wilson Horde
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I, G. Wilson Horde, Assistant United States Attorney for the Eastern District of Tennessee, and as such one of counsel for the defendant in the above-entitled case, hereby certify that on the 26th day of May, 1965, I served a copy of the foregoing Notice of Appeal upon William L. Taylor, Jr., Esquire, Ninth Floor, Maclellan Building, Chattanooga, Tennessee, counsel for plaintiff, by depositing same in the United States mail and addressed to him as above.

(s) G. Wilson Horde
Assistant U. S. Attorney

[Caption Omitted]

[Tr. 2]

APPEARANCES:

For the Plaintiffs:

William L. Taylor, Jr., Esq.
Carl A. Swafford, Esq.
Chattanooga, Tennessee

For the Defendant:

G. Wilson Horde, Esq.
Assistant United States Attorney
Knoxville, Tennessee

William D. M. Holmes, Esq.
H. M. Doster, Esq.
Tax Division
Department of Justice
Washington, D. C.

This cause came on to be heard before the Honorable Robert L. Taylor, Judge, United States District Court, Eastern District of Tennessee, Northern Division, on Monday January 25, 1965, and a jury, when the following proceedings were had:

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[Tr. 9]

W. C. HALE, called as a witness by and on behalf of the plaintiffs, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name and address, please?

Testimony of W. C. Hale

A. W. C. Hale, 534 West Second North Street, Morristown, Tennessee.

Q. What is your employment, Mr. Hale?

A. I am the president of Hale Brothers, Incorporated, which is a corporation dealing in the distribution of fruits and vegetables and also institutional canned goods and frozen foods.

Q. Where is this business located?

A. Morristown, Tennessee.

Q. Are you a party to the lawsuit?

A. No.

Q. Mr. Hale, would you briefly describe some of the positions which you have filled with the company?

A. Well, originally, we were a simple partnership up until probably some four or five years ago. At that time I was a partner in the business, and at the establishment of the business, of course, it was very small and our brother did the inside work and I did the outside work.

[Tr. 10]

I was on the road as a salesman just as Mr. Correll is now.

Q. How many years traveling did you perform?

A. Oh, I guess I worked at it around, exclusively, possibly for 15 years, and then as the business grew I spent less time on the road but I continued to spend some time even until my brother's death which occurred in June, 1960. Since then I can't get out at all, of course.

Q. How long has Hale Brothers been in business?

A. Since 1925.

Q. Always the same line?

A. Well, we have added the institutional lines of canned goods and frozen foods, since that time, rather recently.

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[Tr. 11]

The Witness: You want me to identify that?

By Mr. Taylor:

Q. Yes.

A. This is an invoice envelope in which we place invoices for the merchandise delivered on our trucks.

Q. What appears on the back of that?

A. On the back of it is a map of our territory.

Q. Territory. What do you mean by "territory"?

A. That is the area that our salesmen cover in selling merchandise and the area we serve with delivery.

Q. Hale Brothers?

A. Hale Brothers, that is right.

Q. In accordance with the map that is on the back of that envelope, could you briefly describe the area that Hale Brothers cover?

[Tr. 12]

A. Well, I will start here on the north, we go as far as Manchester and London, Kentucky; come on around and we catch Williamsburg, Kentucky, and Jellico, LaFollette, on to Clinton, out to Oak Ridge, Harriman, Rockwood, and we drop over and work Athens and points in between, you might say, Etowah and points in between; of course Knoxville and this immediate area.

We go as far as Gatlinburg in that direction. And when you start east and northeast, I see it is bounded by Erwin, Johnson City, Elizabethton, Bristol, and we do go to Abington some but not regularly, and we go up in Virginia there as far as Wise and Coburn is the farthest point.

About 135 miles, you might say, we work.

Q. Are those envelopes widely circulated to the public and customers?

A. Practically every invoice that goes out is in one of these envelopes.

Testimony of W. C. Hale

Mr. Taylor: I would like to move it be introduced as Exhibit No. 2.

The Court: Granted. * * *

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[Tr. 13]

By Mr. Taylor:

Q. In the course of your business how does the company sell its merchandise?

A. Well, we have salesmen who go out and solicit orders and take orders, and at the end of the day they bring these orders in, either bring them in or one way or another get them in, and the orders are immediately taken by the night crew and processed—I can got into detail if you want me to.

Q. If we may, let's stop right there for the moment. How many salesmen does the company employ or did they employ in 1960 and 1961?

A. Well, I don't know that my memory is good. We employ 18 now. There wouldn't be much difference in the number at that time. There could have been a couple less. I am not sure.

Q. What is the company arrangement as far as a salesman's compensation is concerned?

A. We pay them a salary and expenses.

Q. Do you have a contract agreement with them?

A. No, it is oral.

[Tr. 14]

Q. You mentioned the point of expenses. Would you go into that a little more elaborately and tell us what type expenses the salesmen incur?

A. Well, of course, we furnish an automobile and all the costs that go with that, and the type expenses you mean, I assume, are the kind he pays out on the route. That would be his meals, meals for customers, which naturally

you do some; gasoline when he buys it on the road; any other incidental expenses he might incur.

That is all done on an audited basis. There is no fixed amount, no set amount, no round figure. It is actually what he spends, he puts it down just exactly what he spends.

And do you want me to explain how it is paid back to him or not?

Q. Yes, if you would. I was just going to ask that question.

A. He turns in—

Q. What do you mean—define what you mean by audit. You used the term "audited basis." Would you explain to the jury what that is?

A. What I mean, audited basis, is their actual expense, no guesswork to it. If he pays 65¢ for his breakfast he puts 65¢ down; if he pay $1.25, he puts that down. If he puts down more than that and we found it out, he would

[Tr. 15]

not work for us.

At the end of the week he turns in the expense, the bookkeeper—I don't see them, I used to, I don't now, the office manager scrutinizes them and he is given this same money back. The same money he started out with and he spent, he is given that back, not one penny more and he should not receive one penny less.

Q. You mentioned there the point of reimbursement of expenses for meals. What meals are there, that is, that your salesmen might incur?

A. Well, whatever is necessary, all of them, eat breakfast, of course, they get out in the business area early. It is necessary and we require that they eat breakfast at certain places, and I don't want them changing their place of eating unless they tell me, because the nature of that business is, you do it in the morning, which I do very early

while the rest of you are still in bed, probably, but we have our inventories and our stock and we may want to promote some particular item, and I want to know where I can call these people?

Q. First thing in the morning?

A. First thing in the morning. In one instance, on a certain morning, we have, I believe, four or five men that always eat at the same place because that saves maybe four or five phone calls on my time. And then at lunch, of

[Tr. 16]

course, we furnish that because obviously a man working anywhere from 40 to 100 miles away from home can't come home at lunch, and also we want them to eat at a regular place.

We require that they eat at a regularly stated place so I'll know where to call and I can get in touch with them. We leave it up to these boys. Also, if a man is out and if his car broke down and he did not get in until nine o'clock at night, we do expect him to eat supper and if he did we would expect to pay for it.

We have some cases where they have finished rather late. Myself, I used to work Knoxville all the time, and I didn't get out of here Saturday nights until about eleven o'clock and I had to eat supper. I think anybody would understand that.

These boys, when they work late they eat their dinner and we pay for it.

Q. As far as these salesmen's routes are concerned, are any of the salesmen on routes where they are required to be out overnight?

A. Yes. Mr. Correll—well, not back at that time, but I assume we do have some men that spend one night a week out.

Q. But generally they return home every day?

A. Generally they do, practically always. There are not many territories that you can work in and not return

[Tr. 17]

every night.

You take some of your territories, like Kentucky, where a man don't have the buying opportunities that they do in Knoxville where, for instance, you can solicit orders on Tuesday and they will defer delivery on the order until Thursday.

You come down here in Knoxville and want to sell a man something Tuesday and if he doesn't get it until Thursday, he will say that he can get it delivered quicker, but in the remote territories you can work it Tuesday and Wednesday and then deliver a couple of days later, and in that case they may spend the night out and it is delivered, for instance, a day later.

Q. You mentioned your delivery there. What is the company procedure in how a customer's order is filled, and give us the background on that.

A. I will. We use an ordinary pad order blank which has three copies. The white copy is the first copy, the yellow copy is the second copy and a third pink copy. These boys write these orders up. At the same time they write them up they make an invoice and also the delivery sheet, and just as soon as the orders come in the night crew grabs them and they grab the first ones and pull the pink copies out.

Then one man takes them and he works the re-

[Tr. 18]

cap sheets, extends the items like, well, maybe he has a certain number of 50 pound potatoes. He makes the recap of those and takes them out and they start getting the order up.

While they are getting the orders up, some of the other men that do this work, they figure the tickets, extend them.

We never let a salesman, of course, extend a ticket. Then while they are extending them they are loaded on the trucks, and we try to get these things up by 4:30 but we can't always do it every night.

Q. Referring to the orders that he takes, a hypothetical illustration, say Monday, the orders that are taken on Monday, when are they delivered?

A. They are delivered on Tuesday.

Q. In your procedure what time are they filled, in your business?

A. Well, as soon as the salesman gets them in.

Q. On Monday evening?

A. On Monday evening, that is right. What you try to do, you try to load your long runs first because you got to get away early. If you take a truck from Morristown to Manchester, if you did not get him away early you would not deliver it the day after.

Q. Why is it company policy to fill these orders at night?

A. Well, that is what we really built our business

[Tr. 19]

on. We are in a small town and built this business this way, and it is the only way. We have got to do a better job than the other fellow and that is service.

Q. Does this have an effect on the salesman?

A. It certainly does.

Q. In what respect?

A. Well, I don't know whether I understand the question or not.

Q. Does the filling of the orders that come in each night?

A. What is—

Q. The filling of these orders that you referred to.

A. There is no other way to get the order in than for him to bring them in. That is his job. If you did not have

a salesman on the road, even if you were soliciting business by telephone, you have a right to put a salesman on the road, but you don't know whether you would get a partial load or a full load and you push them and try to bring the weights up to get a load possible to the company.

Q. Referring to the salesmen, do they have particular territories?

A. They do.

Q. Are they assigned to them?

A. They are.

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[Tr. 20]

Q. Assuming, of course, you have an established business at the present time and established territories, how would you put a new salesman into a territory at this time?

A. Well, you are talking about—I don't know whether you are talking about an emergency where a man might break his leg or break his arm and you have to have someone work it for him.

Q. Assume it is permanent, a new man?

A. Assuming the man you had quit, something happened or you just discharged him, which is something we never do, seldom ever, you had your route sheet. Each one of these boys has a route sheet of the territory. It has each day for your first customer and where he would be at intervals during the day and the time that he is at a certain place.

[Tr. 21]

That is for the convenience of the company so that this man who might take his place knows where he is and he has the route sheet to go by, each salesman does of his complete territory at all times.

Q. What do you do with these route sheets, Mr. Hale?

A. What is that?

Testimony of W. C. Hale

Q. What do you or does the company, the home office do, with these route sheets?

A. These route sheets, we may have to call—he keeps the territory or route sheet in his drawer all the time. I have to have it. I have what I call a salesman's route book, and for each salesman on every day we have got the route of the customers he works beginning in the morning on through.

Q. Mr. Hale, I have just handed you some sheets of paper. Would you identify those for me?

A. It is Homer Correll's work list at the present time on Mondays, and we have—

Q. Would you describe that item at this time?

A. The first thing I see here is Atkins Grill in Sweetwater. They eat breakfast there all the time. They eat there because, one reason, he is a good customer, and another reason that I have got to know where they are.

If they want to change these points of eating,

[Tr. 22]

it is all right, but they have got to let me know where they will be. There is another man in that territory and they both eat there and I can always call them at 6:30 in the morning there and give them any information I want to give them.

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[Tr. 23]

Q. Referring to Exhibit No. 1, I believe it is plaintiffs' Exhibit No. 1, Mr. Hale, those are copies of the book pages which you maintain?

A. That is right.

Q. If it required you contact Mr. Correll at a particular time on a particular day, what benefit would this sheet serve?

A. Well, it would be impossible for me to get in touch

with any of the boys during the day if you did not have these routes sheets here with you at the time.

If you will note, the jury will note over here, we have got the approximate time at each place and they are not off of this time hardly at all.

When I worked on the road I know I did not miss my schedule—tried not to miss is over five to ten

[Tr. 24]

minutes. There are many reasons for that.

Q. What is it necessary for them to follow such a rigid time schedule?

A. Well, the reason is that there are times that you want to call on people in the trade. They may expect them at that time. If they don't keep his schedule, the first thing you know it is going to be noon and you haven't got half of your morning's work done, and there are times that it is best to call on particular customers.

You will note that they have the phone numbers down here also.

Mr. Taylor: Without identification, we would like to introduce that into evidence.

The Court: Received:

(Exhibit No. 1 was filed.)

Mr. Taylor: And could we have that circulated to the jury.

The Court: Please give that to the jury, Mr. Marshal.

(Exhibit was passed among the jury.)

By Mr. Taylor:

Q. Mr. Hale, I am not sure that you made this point clear. You, I believe, testified concerning the breakfast meal. Now referring to lunch, does this schedule pin down the salesmen as to where they have lunch?

[Tr. 25]

A. Pretty well, yes. As I say, if they want to change

their place of eating their meal, why they can but they have got to do it by arrangements made beforehand. I have got to know where they are. The produce business is not like a lot of businesses. It is fast. You have got to do what you do and you have got to be informed and you have to keep your men informed.

Q. Would you elaborate a little bit more on that point, why is it in your particular business, why is it such a necessity to contact these salesmen as quickly as possible?

A. Well, you take for instance last week, we were bringing in a certain size lettuce. You have two sizes. Two dozen size and two and a half dozen size, a certain number of two and a half.

Q. Would you speak up a little bit. I am not sure these gentlemen can hear you?

A. I say, you take lettuce, for instance, last week. There are two sizes of lettuce. Two dozen and two and a half dozen. We bring in a certain number of two and a half dozen lettuce which they can feature in their advertisement and sell some cheaper, and normally the two dozen is a popular size. That is, you sell more of it. I have got to make sure that the trade will use it, and if you have two and a half dozen that you can sell for a dime, the man might sell it, you can let him advertise it and you

have to be sure you have it for him, and if you order 65 cartons of two and a half lettuce you can't guarantee that you are going to sell that much. So we come down on Thursday morning, I have still got Friday left for delivery and Saturday, and we come down and we take inventory and I see that we still have some two and a half dozen lettuce on hand and we have got to get rid of it, get rid of some of this two and a half dozen lettuce because you have the weekend coming up, and we can call them and maybe

cut the price on it some to get rid of it. That is just a good illustration.

That happens in many ways. If you are buying, we are handling from 2,400 to 3,000 cartons of lettuce a week and you have got to know what you are doing to keep up with it.

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[Tr. 27]

Cross-examination

By Mr. Holmes:

Q. Mr. Hale, all of these questions that I will be asking you, of course, I will be asking for the years in suit rather than at the present time.

A. Yes.

[Tr. 28]

Q. Approximately how many salesmen did you have in the company in 1960 and 1961?

A. As I said, we have eighteen now. I don't remember whether we have—the number does change but very little in that length of time. I would say 16 to 18. We probably had 18 back at that time, I wouldn't say.

I am under oath, you know. I got to be pretty careful.

Q. All right, fine, and you paid them a salary and you pay their expenses; is that right?

A. Yes, sir.

Q. Now you also pay their meal expenses?

A. What is that?

Q. You also pay their meal expenses.

A. That last word you are using—

Q. You also pay their meal expenses.

A. Oh, yes, meal. Yes, we do.

Q. Where did Mr. O. M. Cole, where does he live?

A. Mr. Cole lived in Morristown.

Q. In Morristown?

[Tr. 29]

A. Yes.

Q. They have various areas that they work?

A. Yes, sir.

Q. Various territories, I assume?

A. Yes.

Q. Do any of them work in Morristown?

A. Not exclusively, no.

Q. But do they work, say, one day, two days?

A. You know we got to work the Town of Morristown.

Q. All right. How many people work in the Town of Morristown?

A. We have two men that work there partial time.

Q. And they live in Morristown?

A. One of them lives over at Beane Station. Of course, that is twelve miles away, it is a long way, and that costs to spend the night out.

Q. Now do you have any men that work in Knoxville?

A. I beg your pardon?

Q. Do you have any men that work in Knoxville?

A. Yes, sir, we do.

Q. Where do they live?

A. One of them lives here, one lives in Morristown.

[Tr. 30]

Q. I see. Now the man that works in Knoxville, does he work Knoxville exclusively or does he work in Knoxville just two or three days and then some place else?

A. One of the men in Knoxville works in Knoxville exclusively and one works in Knoxville and works Maryville two partial days a week.

Q. You pay the meal expense for all salesmen; is that right?

A. Meals?

Q. Meal expense.

A. Yes, we do. We do not pay the expenses when they are off. We don't pay their expenses on Friday or Tuesday, if that is their day off, or Sunday.

Q. Now did you pay the meal expense for the man when he works in Morristown who lives in Morristown while he is working in Morristown?

A. I assume he put it on his expenses. He certainly should.

Q. In other words, this man works in the vicinity of Morristown, he makes his route in Morristown and he lives there, yet you pay meal expense for him?

A. I assume he puts them all in. He should, because his time is restricted when he sees a customer. If he doesn't see him at the right time he may the first time or two but no more. He goes out to American Enka Corporation

[Tr. 31]

and gets an order except he eats breakfast before that, I believe he does.

Q. And he stops at the place of his choice and eats breakfast.

A. He stops at the place I use. We have two more men there. They give us quite a bit of business there. If he did not use it I would speak to him.

Q. And the man who lives in Knoxville and your Knoxville area man two days a week, he takes the general vicinity of Knoxville, is he the man who lives there?

A. He is in Knoxville all the time.

Q. You pay his meal expenses?

A. I am sure we do. He should put it on there. I assume he does. In fact, I know he does.

Q. The man who lives in Morristown, the man who lives in Knoxville, they lived at home at the time, and they make calls in their home towns, yet you pay their meal expenses?

A. If they are on duty and since we require that they eat at the same place, the customers requires them to call—they have to stagger their calls say, on a school cafeteria. You have certain periods you can call on those dieticians. When you approach the lunch hour you can't call on them too early, they have got things to do, to prepare the noon meal for the children—

[Tr. 32]

Q. You have to call on them early—

A. You can't call on them too early neither, as they approach lunch time, or too soon after lunch. They are cleaning up after lunch and it is absolutely restricted as to when you can call on them.

Q. Let's take, assume in talking about the school you talked about calling on too early in the morning, he would go some place and eat his breakfast somewhere and not eat the breakfast meal at home?

A. He certainly would. He couldn't get his wife up, I don't reckon. She would have to probably get up at four in the morning to prepare breakfast.

Q. Be pretty inconvenient to get up?

A. It would. I don't think she would want to.

Q. Thank you. Actually, just one more question on this, is it your policy to reimburse salesmen at least for the breakfast and dinner meals regardless of where they live or regardless of where they work?

A. If they are working for us on that particular day.

Q. Working for you on that particular day.

A. If it is for our convenience that they do it at a certain place and a certain time we do.

Q. When you hire a new man, when you are hiring a new man, in that particular period of time, did he know

[Tr. 33]

that his meal expenses were going to be paid when he came to work?

A. Well, if we employ anybody he understands that we pay his salary and expenses. I think that covers that, answers that question.

Q. Then he knew his meals, his breakfast and dinner expenses—

A. I assume he did if we agreed to pay his salary and expenses.

Q. You mentioned the maximum limits on any of your salesmen was 135 miles?

A. I think that is about 130 miles to Manchester, Kentucky and about the same to Coburn, Virginia.

Q. If my arithmetic is correct, the maximum round trip any of your salesmen would make would be 270 miles and not all of your salesmen do that?

A. No, sir, they don't all go that far; no.

Q. And some of your salesmen might go 50 or 60 miles and then return the same night?

A. That's right. Some live at Greeneville, which is 30 miles, 28.

Q. And if they go 30 miles and remain that night their meal expenses would be paid?

A. Certainly. The distance involved would not affect it, I don't think.

[Tr. 34]

Q. In the years 1960 and 1961, Mr. Correll did not spend overnight anytime during that period, did he?

A. As I recall he did not at that time.

Q. I beg your pardon?

A. I don't think he did at that time.

Q. Then he returned, he would leave his home, make his calls, eat his meals, pay for them out of his pocket and be reimbursed for them and he would return the very same night?

A. I am sure that is what he would do. I don't know where he was at night. I assume he was.

Testimony of W. C. Hale

Q. Do you know where Mr. Correll lives?

A. He lives on Fulton Road in Fountain City.

Q. Approximately how far is that from Morristown?

A. Well, you know, to get from Fountain Cty to Morristown is quite a circuitous route. About 40 miles to Knoxville. I guess about 45 or 46 miles.

Q. Then in effect when he eats his first breakfast meal, he could be possibly 75 miles away from Morristown, this is just an approximation?

A. He is further than that. He is out at Sweetwater.

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[Tr. 35]

Q. Now, Mr. Hale, I would ask you this, do you tell your salesmen, did you tell Mr. Correll, I will put it, in the years 1960 and 1961 exactly the place to eat each time he ate one of the meals?

A. Let me explain it this way. I have done told you before but I will explain it again. I knew he was eating at John Doe's, and that is where he eats breakfast, and he eats lunch with another man over here.

I am not going to say you have always got to eat with this man right here at breakfast and for lunch, but I have got to know—you have got to eat somewhere so I can get in touch with you, and I also want you to eat with a customer, of course.

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[Tr. 36]

Q. Now on Wednesday which place does he eat breakfast?

A. Well, if you ask me if he ate at the Central Cafe in 1960, I can't say that he did. I don't remember that, but he ate at a stipulated place.

Q. And I believe at 6:00 a.m., Central Cafe, Coffee Shoppe, S & C Lunch—those are the first three, and Mr.

Correll more or less had the option of these three places to eat at, didn't he?

A. Well, he wouldn't eat at the Service Grocery, that is not a restaurant.

Q. The first three.

A. He had the option to this extent, if he decided where he wanted to eat, I assume he decided to eat at that place because that is where the phone is shown, that is at this time. If he wants to change and lets me know and

[Tr. 37]

gives me the information so I can get in touch with him, it is all right.

Q. You don't require him to eat, have to eat at this particular place, you have to eat at this particular place?

A. Yes, I do. I don't recall where he was eating at then, but I do require him to use a certain place regularly.

Q. At a certain place?

A. Yes, that is correct.

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[Tr. 40]

Redirect Examination

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By the Court:

Q. Now you want to deal specifically with Mr. Homer Correll and the Hale Company, which is the only name that is involved with this jury in this trial.

Was he reimbursed during the period of time in question, namely, the years 1960 and 1961, for any meals that he ate at his home in Fountain City?

A. No, sir.

Q. Was he reimbursed for any meals during this period of time that he ate in Morristown?

A. No, sir, because he is never in Morristown, Judge, unless he just happens to come up for an infrequent

[Tr. 41]

visit.

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[Tr. 42]

HOMER O. CORRELL, plaintiff, called as a witness by and in his own behalf, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Taylor:

Q. Would you state your name and address, please?

A. Homer O. Correll, Fulton Road, Fountain City.

Q. What is your occupation, Mr. Correll?

A. Salesman with Hale Brothers, Morristown.

Q. As a salesman with Hale Brothers what line of business are you in, what type products do you sell?

A. Wholesale fruit and vegetables and institutional

[Tr. 43]

canned goods and institutional frozen merchandise.

Q. How long have you been in this particular line of business?

A. 27 years this January.

Q. How long have you been with Hale Brothers?

A. Twelve and a half years. Will be thirteen years August 15th of this year.

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Q. Mr. Correll, referring to your position with Hale Brothers, how are you compensated?

A. I am compensated with a salary, automobile furnished, and expenses.

Q. You say, "salary." During the years 1960 and

[Tr. 44]

1961, what was your salary?

A. My salary was $75.00 a week.

Q. Were you on straight—

A. Straight salary, $75.00 a week.

Q. Did you sales, the amount of your sales have any effect upon your salary?

A. No, sir. At that time it did not. No commission whatsoever.

Q. Referring to the expenses you mentioned, what type expenses do you incur in the course of your employment?

A. I incur meals, my breakfast and my lunch away from home which is required. My territory requires me to be away from home. It is required by the company that I work this territory.

I also incur automobile expenses, which I don't live in Morristown and I buy my gas here in Knoxville, and have my car serviced.

And I might take a customer out for lunch. Sometimes I do take a customer—call on him at lunchtime, take him out for lunch. That is a company expense also.

Q. Insofar as the payment for these expenses, who advances the funds for this?

A. Well, to begin with I use my own money, out of my own pocket for the company. At the end of the week I am reimbursed what I spent for my expenses.

[Tr. 45]

Q. What type of information do you report to your employer?

A. I make out a little pad, expense sheet, each day on my breakfast, also my lunch, or if I took anyone for lunch, lunch for two, and the amount of that lunch for both of us.

Q. And you accumulate this over a week?

A. Over a week at a time, and my gas tickets, I pay for my gas every week and I turn in my gas tickets also.

Q. How much do you receive from your employer for this?

Testimony of Homer O. Correll

A. The amount that I turn in, the amount that I spend.

Q. This particular accounting procedure through which you go to be reimbursed for your expenses, is this a policy of Hale Brothers which they follow ever since you have been there?

A. Yes, sir.

Q. What about your previous employers?

A. Ever since I have been on the road. It is the same procedure. All the companies I gave you, that was their procedure also.

Q. The same type of expenses?

A. Same type expenses.

Q. For the same items?

[Tr. 46]

A. Same items.

Q. Referring specifically to meals.

A. Meals, yes, sir. My expenses have always been paid for 27 years I have been on the road.

Q. Now then, Mr. Correll, in 1960 and 1961, and I refer you to plaintiff's Exhibit No. 2, I believe it is, would you briefly describe the territory which you covered in your occupation during those years?

A. Yes, sir. I worked this territory since I have been with Hale Brothers for the last twelve and a half years.

Etowah—well, start at Madisonville, Inglewood and Etowah; Athens, or starting at Sweetwater, right there is where it is, and Athens, Tennessee, that is Mondays and Thursdays I work that territory.

And on Tuesday and Wednesday and Saturday, I work, at that time I was working Lake City; Caryville, Jacksboro, LaFollette and Jellico.

Q. At that time on Tuesday, 1960 and 1961?

A. On Wednesday. Worked that on Wednesday.

Q. What area did you cover on Tuesday?

Testimony of Homer O. Correll

A. Maryville, Mascot, Straw Plains and Maryville, Walland, Townsend and Friendsville on Tuesday, at that time, 1960 and 1961.

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[Tr. 47]

Q. Let's get a little more specific, say, referring to Monday, and starting with the time that you arrive and let's go through your work schedule for Monday.

A. Yes, sir.

Q. To be specific and pin it down for us in this particular case.

A. On Monday morning I arise at 4:30 a.m. About five o'clock I leave home. I meet Mr. Thompson. There are two salesmen in this Athens and Etowah territory, business requires it. I meet him at 5:15 or 5:20 at the Firestone place on Magnolia and Gay Street.

The Court: What town?

The Witness: About 5:20 a.m., Judge.

The Court: In what town?

[Tr. 48]

The Witness: In Knoxville.

A. (Continuing) We drive to Sweetwater, arrive in Sweetwater at approximately 6:15 or 6:20.

We go to Atkins Grill, we have our breakfast. I work this customer, a good customer of Hale Brothers, and I proceed then with my work for the morning in Sweetwater.

I usually get through around ten—between 10:00, 10:30, and then work Niota, go to Niota and work four customers.

From Niota I drive on to Athens and then there is approximately 12 or 15 customers in Athens that I work.

Q. Approximately what time on Monday do you arrive at Athens?

A. Approximately 11:00 to 11:30. Between 11:00 and 11:30.

Testimony of Homer O. Correll

Q. Approximately what time do you have lunch on Monday?

A. Around 2:00.

Q. Where do you eat lunch?

A. I eat at Newton's Cafe.

Q. You referred specifically to, I believe it was Atkins Grill and Newton's Cafe. Do you eat breakfast and lunch at these two places every Monday?

A. Yes, sir. I eat breakfast at Atkins Grill

[Tr. 49]

in Sweetwater on Mondays and lunch at Newton's.

Q. Why do you eat at these places on a regular basis?

A. Well, they are customers of Hale Brothers and I eat there—we eat at this particular place because Mr. Hale, if necessary to get in touch with me by telephone, as he stated in his statement, that it is necessary a lot of times that he get in touch with the salesmen on the road, so we usually eat at a specified place. If it is a customer we eat there at this place where it will be convenient where he can find us.

In other words, for price changes or any information regarding our merchandise for the shipment for next day.

I could go down to Sweetwater and if I find there was a price on oranges or apples, I might be higher, my competitor might be cheaper, and if I—if he knows that or knows where to find me at that particular time, that is the reason the schedule is made up, then I won't miss any business. Maybe I can meet this competitor with this price.

Q. How does Mr. Hale know that he can get you at these particular places?

A. We have a route sheet and he has a copy in his office on file. We keep a route sheet in our box.

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[Tr. 50]

Q. Why is it necessary that he get in touch with you at these specific times as far as your schedule is concerned?

Testimony of Homer O. Correll

[Tr. 51]

A. Some merchandise, the type merchandise we sell is fast merchandise. The price might change, it might change twice a day.

This morning when we start out something might be fifteen dollars on an item and by noon it might be four dollars, and in order to give the customer the benefit of price and also to give him the service we are required to have the times, the approximate times that we will be at a certain point so Mr. Hale can call us and give us the price changes.

Q. Does the customer have anything to do with it as far as the time schedule is concerned?

A. A lot of customers do, yes. For instance, at the T.M.I. School, I have to see Mrs. Goodman at approximately eight o'clock of a morning. I have one grocery man on Monday I have to see at 12:00 o'clock noon, and a lot of schools. You can't go there during the lunch hours because, and restaurants, because they are eating at lunch time and you can't go during lunch hours because they are busy with their customers, so we have to arrange our schedule so we can work those for the convenience of the customer and also for the convenience of the company and myself.

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[Tr. 52]

Q. I believe we got down to your having lunch on Monday in Athens. After lunch, approximately, let's go through your schedule that afternoon, Mr. Correll. What would be your schedule on Monday afternoon?

A. Well, Monday afternoon after I eat lunch, usually I work this one school at Ingleside, Ingleside School, and I come back to Sweetwater and work two customers

[Tr. 53]

there, and I am usually through about 4:00 p.m., in Sweetwater.

Q. Why didn't you work all of those customers in Sweetwater when you went down?

A. It isn't at their convenience. We can't work them in the morning. He will say, "You have to see me this afternoon. I dont' know what I am going to need this morning. I don't know what I am going to need, you will have to come back and see me this afternoon," and that is for the convenience of the customer.

Of course, I have competition and if I don't call on him my competitor will call on him.

In one place there are about three of us in there at one time, and they won't see you of a morning. That is one or two particular customers.

Q. What time on Monday afternoon do you normally complete your work schedule?

A. Usually around between three-thirty and four o'clock in Sweetwater.

Q. Approximately how far is this from your home?

A. Oh, approximately 50 miles. I believe it is 52 miles from my home to Atkins Grill. I have measured it several times.

Q. You return home every afternoon?

A. Yes, I return home every afternoon.

[Tr. 54]

Q. In 1960 and 1961, on your trip to your territory, Mr. Correll, what was the approximate mileage that you covered in the course of a day?

A. Approximately 150. It will vary a little bit if you have to go back and double back on a customer, but it will average between 150 and 175 miles a day.

Testimony of Homer O. Correll

Q. How did you travel in those years, Mr. Correll?

A. By automobile.

* * * * * * * *

[Tr. 55]

Q. Referring to the orders which you have taken, how are these orders filled?

A. They are filled by our warehouse crew in the evening as soon as they can get our orders in or we get our orders in, and they are filled by the warehouse crew of a night and they are delivered the next morning in my territory which is a long distance from Morristown.

My customers require, some of them, that they get their merchandise, say, in Athens, Tennessee, I have two customers in particular who want their merchandise between 7:00 and 7:30 Tuesday and Friday mornings.

So I get my ord s in to the warehouse as soon as possible and as soon as they are filled the truck leaves there at approximately 1:30 or 2:00 of a morning, next

[Tr. 56]

morning, and he delivers the orders—all orders taken today are delivered tomorrow.

Q. How do you get the orders to Hale Brothers?

A. On Mondays and Thursdays, Mr. Thompson, another salesman in this territory with me, Athens and Sweetwater, Mr. Thompson meets me at Mr. Shanks' grocery in Sweetwater about 3:30 or 4:00 o'clock in the evening, and he lives in Morristown so he takes my orders into Morristown, meets me at Shanks'. And on Thursday the same procedure. He meets me and he takes them on into Morristown and I come on in home.

Q. Does this completion of orders and delivery schedule, the service element involved, is this important to you?

A. It certainly is.

Q. In what respect?

A. Service is our business, quality merchandise and service. If we did not have that I would not have a job. We would be out of business.

Q. Does it have any relation to the route and schedule being followed?

A. Yes, it certainly does.

Q. In what respect?

A. Well, by getting the merchandise to the customer when he wants it. If you didn't, he will say, "My

[Tr. 57]

competitor, he can get it here," and so we have to give him service.

Q. Mr. Correll, I think we were referring to Monday, approximately how many customers do you call on in the course of Monday?

A. Approximately 30 customers.

Q. How many each week?

A. In a week, I have in my territory, over-all territory, approximately 100 customers.

Q. Does that mean 100 different calls in the course of a week?

A. Yes. I see all of them. I try to see all of those customers once a week.

Q. Do you see any of them more than once?

A. Yes, sir. I see some of them twice a week. One end of my territory I see them twice a week. Down at Athens and Etowah, in that territory, I see them all once a week and about five or six of those customers I see twice a week.

Q. I am backtracking here a moment, you testified that you ate breakfast on the road. Why is it necessary for you to eat breakfast on the road, why can't you eat at home?

A. Well, I had rather eat at home, be cheaper and probably better being in that early morning too, but it is required of me by the company that I am in this territory

Testimony of Homer O. Correll

[Tr. 58]

at this time of morning, and, in fact, I would have to be in this territory this time of a morning to give our customers service and also for the convenience of my company, to get the orders back in of an evening as soon as possible so they can be delivered early the next morning.

Q. Do you have an off day in this schedule?

A. I am off Fridays.

Q. Where do you have lunch and breakfast, your meals on that off day?

A. I eat at home on Friday.

Q. Does the employer pay for any of that expense?

A. He certainly does not.

Mr. Taylor: You may ask him.

Cross-examination

By Mr. Holmes:

Q. Mr. Correll, just to emphasize this for the jury, approximately how far do you live from Morristown itself?

A. Approximately 45—40 to 45 miles.

Q. Now we have been using Monday for an example and I guess you would call that a typical work day as far as travel is concerned?

A. Monday?

Q. Yes.

A. Yes, I would. You may use that.

[Tr. 59]

Q. Where did you say you ate dinner, in Sweetwater?

A. No. I eat dinner in Athens, Tennessee.

A. In Athens, Tennessee.

A. Yes, sir.

Q. Approximately how far is Athens from your home?

A. 65 miles.

Q. How far is Athens, approximately, from where Hale Brothers, Incorporated is located?

A. Approximately 105 to '10 miles.

Q. Now you eat breakfast farther from Hale Brothers in Morristown than you do breakfast, and what is that distance?

A. Yes. Approximately 20 miles south where I eat lunch than where I do breakfast.

Q. How far from Morristown do you eat lunch?

A. Eat lunch?

Q. Yes.

A. I guess Athens is 105 miles. I gave you that.

Q. Not breakfast. I am talking about dinner and I am trying to get the distance in the morning you are required to drive, you say 105 for breakfast?

A. No, I did not say 105. You asked me lunch first.

[Tr. 60]

Q. Yes.

A. Yes, my lunch is approximately 105 miles.

Q. From Morristown?

A. From Morristown. From Morristown Sweetwater is approximately 80 miles, 80 to 85 miles where I eat breakfast.

Q. O. K., thank you. Now I would just like to ask you one question about your reimbursements, and you stated that you ate breakfast on the road but you had rather eat breakfast at home because it would be cheaper.

A. Yes.

Q. You are reimbursed for your breakfast meal?

A. Yes, I am reimbursed for my breakfast.

Q. Actually then aren't you financial better off by being reimbursed for the meal you eat out than you would be if you were to eat at home?

A. No, I would say not because this is—

Q. In other words, I mean, the fact that if you were not reimbursed for meals, eating breakfast on the road, it would cost you more money?

A. I would still have to eat breakfast if I wasn't reimbursed for my meals.

* * * * * * *

[Tr. 67]

Q. Approximately what time do you return each day?

A. Oh, approximately, get in between 5:30 to 6:30 in the afternoon.

Q. In your deposition you said you got in approximately between 4:30 and 5:30?

A. That is on Monday. On Thursdays now, I am later, on Thursdays.

Q. But as a general rule—

A. A general rule it will average, during the week, say five o'clock. I would say around five o'clock, and on Thursdays, accordings to the weather condition.

Q. In the years 1960 and 1961 did you ever spend the night out, say overnight anywhere?

A. I don't remember if I did. I might have spent one night.

Q. To your knowledge you returned each day?

A. Yes.

Q. Mr. Correll, would you tell us where you went to on Tuesday in 1961, 1960?

A. In 1960 and 1961 I went to Maryville, Walland, Townsend and Friendsville and Mascot and Straw Plains.

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[Tr. 68]

The Court: I am afraid the jury can't hear all the witness is saying. Please speak and look so that the jury can hear what you are saying.

A. (Continuing) On Tuesday I go to—at that time?

Q. At that time.

A. In 1960 and 1961 I went to Maryville, on to Town-

send and to Walland, and Friendsville, back to Mascot and Straw Plains and Four-Way Inn.

Q. Where did you say you went from Maryville?

A. Maryville, I don't know whether it is on this map or not. It is down in the country, schools.

Q. About how far is that?

A. It is about, Friendsville is approximately 15 miles south of Maryville, and Townsend is away up in the mountains, up above Kinzel Springs.

Q. What would you say is the farthest point in distance from home, say on a straight line, as the crow flies, that you go on Tuesday?

A. I would say approximately 55 miles.

Q. Approximately 55 miles?

A. Yes. In other words, on that day I usually drove more than I did in the Athens distance, running around. I drove approximately 180 to 185 miles.

* * * * * * *

[Tr. 70]

The Court: Anything further?

Mr. Taylor: No, the plaintiff rests.

The Court: Anything for the Government?

Mr. Holmes: No. At this time the Government rests and will the Court at this time entertain a motion?

The Court: Yes, sir. Let the jury step out temporarily.

(The jury was excused from the courtroom, and the following proceedings had in the absence of the jury.)

Mr. Holmes: At this time the Government would like to make a motion for a directed verdict.

The Court: Yes, sir, I will hear you.

Mr. Holmes: The directed verdict is explained here in this memorandum that I have given you, but specifically we ask for a motion on the ground that, first of all, the ex-

penses have to be included in the income and we have shown they are not meals in kind—they are reimbursements for the meals themselves; second, that the meals were not on the business premises of the employer as Mr. Correll was a distance from his employer's premises when he made his calls; and, third, that the particular meals were not for the convenience of the employer.

[Tr. 71]

We ask for a directed verdict on the ground that these particular deductions for these particular meals should not be deducted because of the ground that he was not away from home within the meaning of the statute and these particular expenses were personal.

The Court: Yes. Well, the Court recognizes that you have some support from some of the Court's to support your position on this motion; it also recognizes that there are cases which do not support your position, and from all of the evidence in this case the Court is of the opinion that the proof makes an issue for the jury.

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[Tr. 73]

AFTERNOON SESSION

(At 1:35 p.m., court reconvened pursuant to the noon recess and the following proceedings were had at the Bench between the Court and counsel out of hearing of the jury:

The Court: In support of the Court's action in overruling the motion to take the case away from the jury, see Hanson v. Commissioner, 8 C.A., January 16, 1952, 298 F. 2d 391; Williams v. Patterson, Director of Internal Revenue, 5 C.A., January 12, 1961, 286 F. 2d 333; Williams v. Patterson, District Director, 5 C.A., 286 F. 2d 333; Chandler v. Commissioner, 1 C.A., 226 F. 2d 467; U. S. Junior Chamber of Commerce v. U. S., Court of Claims, 334 F. 2d 660;

Magness v. Commissioner, 5 C.A., 247 F. 2d 740; S. S. Kresge v. U. S., June 4, 1963, 218 F. Supp., 240, U.S.D.C. E.D. Michigan.)

(The following proceedings were had in the presence of the jury.)

The Court: Gentlemen, you may proceed with your argument.

(Remarks of the Court off the record.)

(Counsel for the respective parties presented oral argument to the Court and jury, during the argument of counsel for plaintiff the following occurred:)

* * * * * * * *

[Tr. 75]

The Court: Members of the jury, this is an action by plaintiff Homer O. Correll and his wife, Dorothy Correll, to recover taxes which they claim were over-paid to the Government.

Mrs. Correll is what is known in the law as a technical party to the lawsuit. She is joined as a plaintiff simply because she signed the income tax returns along with her husband. So the real party to this lawsuit is Mr. Correll, the husband. He is the person who did the work for this company and he is the person who ate the meals and was reimbursed for the meals which are the subject of this lawsuit.

Now Mr. Correll says that he was a salesman for Hale Brothers Produce Company of Morristown, Tennessee; that he left his home in the performance of his duties early in the morning and traveled over a set route which has been described to you in one of the exhibits filed in this record and described by him orally; that this route, the round trip which he made during the week, during the five days of the week that he worked, covered approximately 150 miles or possibly more, even as high at 200, but that is a matter of proof and as a matter of fact to be determined by the jury

like all other facts; that he ate breakfast and lunch on the road and that he returned to his home each evening, and after returning to his home he submitted his orders to his employer

[Tr. 76]

for the delivery the next day; that he incurred traveling expenses in the course of his day's work; that among these expenses were his meals, breakfast and lunch—those are the only expenses that are involved in this lawsuit; that the amount that he paid for his breakfast and the amount that he paid for his lunch each working day and which he says he paid with his own funds but which he also says he accounted for to his employer and that his employer reimbursed him for these meals at the end of each week.

Now he says, or his lawyer says for him, that he is entitled to deduct these meals which were traveling expenses from his income under Section 119 of the Internal Revenue Code and under Section 162 of Title 26 of the Internal Revenue Code.

Now the Court instruets the jury that he cannot deduct these meals under Section 119 of Title 26 of this Code because that section provides, in pertinent part, that in order to deduct them as expenses and in order for them to be excluded from his income, that the meals would have had to have been furnished on the business premises of the employer.

Now these meals were not furnished on the premises of the employer because the premises of the employer are located in Morristown, Tennessee.

Secondly, that in the case of lodging, the employee is required to accept such lodging on the business premises

[Tr. 77]

of his employer as a condition of his employment.

Now, as indicated, these meals were not eaten on the premises of the employer and, therefore, in the opinion of

the Court, as a matter of law, he does not come within the purview of Section 119 of the Internal Revenue Code for the reasons indicated.

Now there is a question for the jury as to whether or not he comes within purview of Title 26, Section 162, of the Internal Revenue Code, and the Court will read pertinent parts of that section before this charge is finished.

Plaintiff says that the Commissioner has made an arbitrary classification or line of distinction that requires the person to stay away from home during a period of rest or overnight before these expenses of meals are deductible.

In that connection, briefly stated, the Commissioner says, in substance, that before you can deduct meals of this kind you must stay away from home at night.

Now the Court charges you that as a matter of law that is not written into the statutes that a person must stay away from home at night in order to get expenses of this character. It is true that the Commissioner has issued a regulation to that effect, and it is for you to determine under all the facts of this case whether or not that is an arbitrary regulation as applied to these plaintiffs under the facts in this case. Plaintiff says that these are de-

[Tr. 78]

ductible expenses incurred for the convenience of the employer under Section 119 or ordinary business expenses under Section 162.

Now up to this time the Court has tried to state briefly and as concisely as possible the contentions of the plaintiff in this case. Now if the Court has misstated any of these contentions or it has failed to cover them adequately or properly, do not let that prejudice the rights of plaintiff in this case or the rights of the Government.

Now the Court is about to follow the same pattern at this time in stating the contentions of the Government in the case, and also if the Court fails to state those conten-

tions properly or adequately do not let that failure prejudice these plaintiffs or the Government in this case.

The Government contends that these meal deductions should be included in income, and says that under Section 119 there shall be excluded from gross income only the value of any meals and lodgings furnished by an employer on the premises of the employer.

Now the Court has already ruled that Section 119 is out insofar as this jury is concerned.

The Government says that this has not been done and that it has not been furnished for the convenience of the employer; and that, under the regulations, to be deducted they have to be meals in kind rather than money paid to the

[Tr. 79]

taxpayer to buy the particular meals.

Now the Government says further that these are personal expenses and do not come under Section 162(a)(2) of the Internal Revenue Code because this statute applies to traveling the taxpayer does away from home. The Government says that this traveling of Mr. Correll was not done away from home, that it was done within the meaning of this statute at home and that Section 162 would be the only statute under which these meals could be deducted from his income.

Now in the opinion of the Court that is a correct statement of law, that this is the only statute that these meals can be deducted from income and it is a question for the jury whether or not under the facts in this case they can be deducted under this section, namely, Section 162 of the Internal Revenue Code.

Gross income means all income from whatever source derived, including compensation for service and similar items.

Colloquy Between the Court and Counsel

Section 162 provides, and the Court is about to read what it considers the pertinent part of this Section 162 which is involved, in the opinion of the Court, in this case.

"Trade or business expenses. In General.—There shall be allowed as a deduction all the ordinary and

[Tr. 80]

necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses(including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

These are the key words, "while away from home in the pursuit of a trade or business."

In deciding the overriding issues, or the controlling issues in the case which the Court will state to you before this charge is concluded, the jury will have to answer the question whether or not the expenses incurred away from home, were the expenses for these meals necessary for the employee to properly perform the duties of his work, or were they expenses incurred for the personal benefit of the employee? Should he have eaten them at his home rather than eaten them away from home in order to properly carry on his business or to perform adequately his duties as an employee of this produce company—I have forgotten the name but that does not matter, it is the produce company in Morristown—Hale Brothers.

Now this is the issue for the jury to decide. Are these expenses—we are talking about the meals which were eaten by Mr. Correll away from home on his work days and that included the meal at breakfast and the lunch meal—are these (meaning expenses for meals away from the taxpayer's

[Tr. 81]

home, that is Mr. Correll) ordinary and necessary business expenses within the definition of Section 162, which the

Court just read to you? If they were, the jury should find in favor of the plaintiff; if they were not, the jury should find in favor of the defendant.

Taxpayer was employed as a traveling salesman in 1960 and 1961, by—these are the words that the Court lost—Hale Brothers, Inc., a wholesale produce and grocery company in Morristown, Tennessee. Taxpayer took orders five days a week in a territory assigned to him by his company, which necessitated his traveling between 75 and 150 miles round trip, depending upon the length of the daily assigned route. He left home in Knoxville, Tennessee, at approximately five a.m., drove in the direction of his route for over an hour and ate breakfast, or around an hour—that is a matter of proof or fact for the jury to determine—which usually lasted 45 minutes at a restaurant of his choice. Taxpayer then made calls on his company's customers until the noon hour when he ate his noon meal at a place of his choice. The noon meal usually took 45 minutes. Taxpayer then resumed his duties as a salesman, returning to the vicinity of his home at approximately 4:00 p.m. He gave the orders he took that day to another salesman of Hale Brothers who took them to the main office in Morristown.

Taxpayer paid for the two meals each day himself

[Tr. 82]

and submitted a report of the expense of his meals to his employer. His employer reimbursed him weekly for these expenses he had incurred. The Commissioner of Internal Revenue determined that the reimbursements should have been included as a part of taxpayer's income, and assessed an additional tax based upon the amounts of such reimbursements for 1960 and 1961. Taxpayer paid the assessment and filed a timely claim for a refund which was rejected.

And that is the reason of this suit, the rejection of this refund by the Commissioner.

It is the contention of the Government that the reimbursed expenses should be included in taxpayer's income for such years.

Taxpayer contends that the expenses were incurred as ordinary and necessary expense in carrying on the trade or business and should be excluded from his income.

You heard an explanation, a detail explanation of the taxpayer as well as the president or some official of Hale Brothers, Inc., as to the reasons why the taxpayer ate his breakfast at a certain place at a certain time and why he ate his lunch at a certain place at a certain time, why as claimed by the taxpayer that the schedule of taxpayer's work was a rigid schedule for the reasons which you heard the taxpayer give as well as his employer, Mr. Hale, as a representative of the Hale Brothers Produce Company.

[Tr. 83]

The pertinent part of Section 162 provides that there shall be allowed as deduction all the necessary and ordinary expenses paid and incurred during the taxable year in carrying out any trade or business, including traveling expenses and including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business.

You are instructed that the cost of meals while on one-day business trips away from home need not be incurred while on an overnight trip to be deductible, so long as the expense of such meals is incurred as an ordinary and necessary business expense by the plaintiff in carrying on the trade or business.

To determine whether or not the expense of meals incurred by the taxpayer is an ordinary and necessary business expense incurred in carrying on the trade or business, the terms "ordinary and necessary" generally mean whether

the expense proximately results from the carrying on the particular business involved and has some reasonable relation to that business.

* * * * * * *

[Tr. 85]

The Court: All right. Now gentlemen for the Government, Mr. Doster for the Government, do you have any objection to any part of the charge or any special request?

Mr. Doster: Yes. We would like to except to the Court's failure to direct a verdict. We believe that the Court has submitted essentially a question of law to the jury, that there are no facts or inferences to be drawn from the facts which are in

[Tr. 86]

dispute or evidence before the Court.

We would also like to object to the undue emphasis the Court placed on the so-called "overnight rule." We believe it had a tendency to make the jury believe that the Court was instructing them that he was in fact away from home when these expenses were incurred.

We feel this was further compounded when you instructed the jury that the plaintiffs were entitled to a deduction of ordinary and necessary business expenses without qualifying that by saying he must in fact be away from home when they were incurred.

The Court: All right. Call the jury back.

(The jury returned into open court, and the following proceedings had in the presence of the jury.

The Court: Members of the jury, in using certain language which is to be found in Section 162, Internal Revenue Code, particularly the phrase "away from home" or "at home," the Court has not intended to convey the idea to the jury that it has any views with respect to whether or not

these expenses were actually incurred by the taxpayer away from home within the meaning of Section 162.

The Court intended to say to you, and believes that it did say to you, that is a question solely for the jury, that is a question of fact which is the prerogative of the

[Tr. 87]

jury to decide, and if the Court has used language of that kind more than once in this charge, do not let that prejudice the rights of the Government or the taxpayer.

The Court has not intended to over-emphasize any of the language in Section 162 of the Code. The Court has done its best to give the jury in its own language and in the language of the respective parties, the theories of the respective parties in this case, and has tried to read from Section 162 what it considered the pertinent language that the jury should know in deciding the facts in this case and in reaching a verdict.

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[Tr. 88]

Mr. Taylor: Yes, your Honor.

The Court: Mr. Foreman, have you reached your verdict?

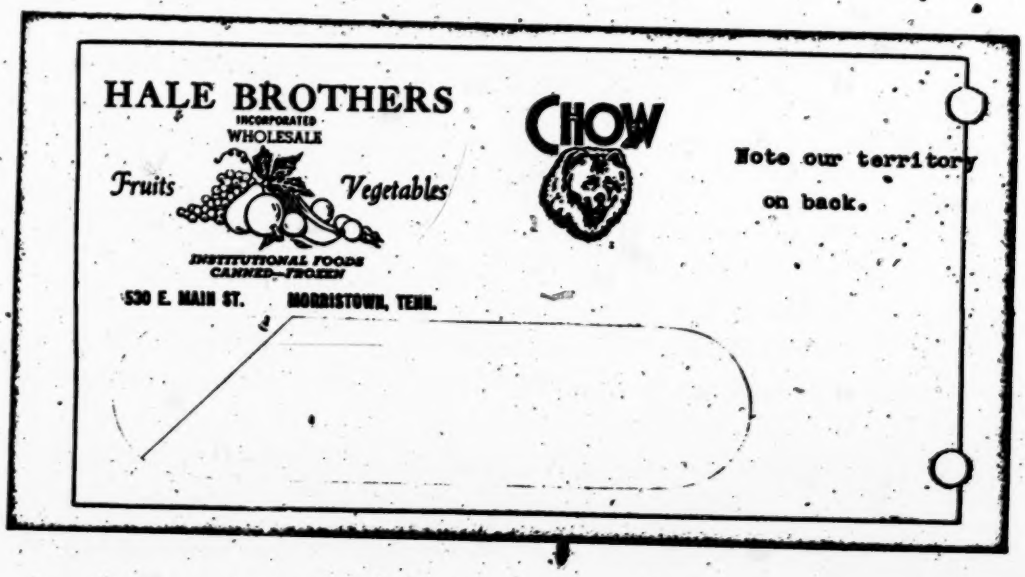
The Foreman: We have, your Honor. We find in favor of the plaintiff.

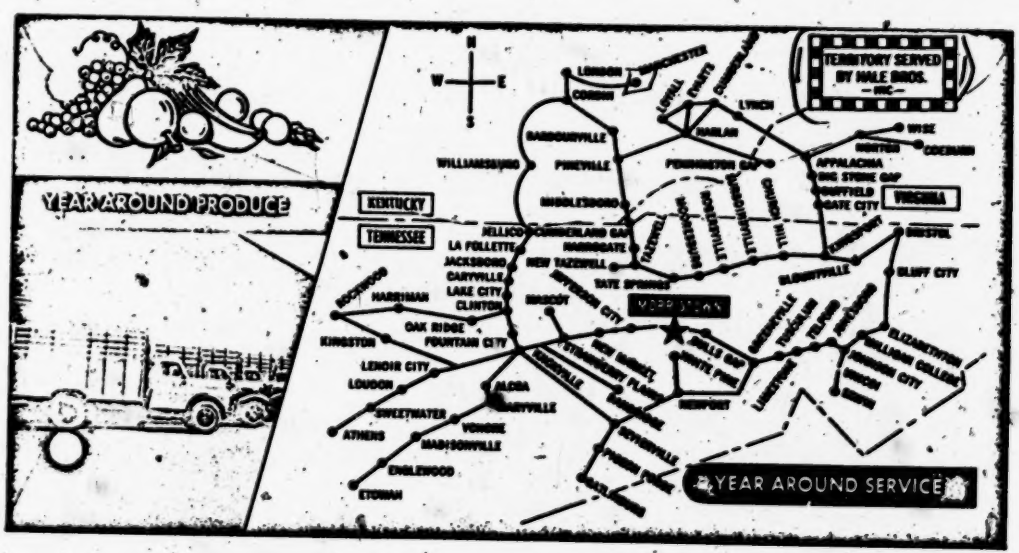
The Court: So say you all?

(The jury indicated in the affirmative.)

* * * * * * *

EXHIBIT No. 2


HALE BROTHERS
INCORPORATED
WHOLESALE
Fruits
Vegetables
INSTITUTIONAL FOODS
CANNED—FROZEN
530 E. MAIN ST. MORRISTOWN, TENN.
CHOW
Note our territory
on back.


YEAR AROUND PRODUCE
KENTUCKY
TENNESSEE
VIRGINIA
TERRITORY SERVED
BY HALE BROS.
INC
MORRISTOWN
YEAR AROUND SERVICE

In the

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 16,767

United States of America - - Defendant, Appellant

v.

Homer O. and Dorothy Correll - Plaintiff, Appellees

STIPULATION FOR JOINT APPENDIX

Pursuant to Rule 16(5) of the Court, it is hereby stipulated by and between counsel for the respective parties that the following materials shall constitute the contents of the joint appendix to be filed in this case, each party to bear the cost of printing the portion of the materials designated by him for printing in correspondence between the parties:

1. Docket Entries.
2. The Complaint, including the claims for refund and riders attached thereto.
3. Answer.
4. Pre-trial Order of January 21, 1964, as amended.
5. The Defendant's Motion for Directed Verdict.
6. The Defendant's Motion for Judgment Notwithstanding the Verdict.
7. The Order denying the Defendant's Motion for Judgment Notwithstanding the Verdict.
8. Judgment.
9. Notice of Appeal.

Stipulation

10. The following portions of the Transcript of Testimony:

Page	Lines
2	all
9	all
10	1–13
11	11–25
12	1–20 to word "Granted"
13	4–25
14–19	all
20	10–25
21	all
22	1–5
23	11–25
24	all
25	all
26	1–15
27	20–25
28	1–17, 23–25
29–31	all
32	1–25
33	all
34	1–22
35	13–25
36	10–25
37	1–10
40	1–7, 17–25
41	1
42	13–25
43	1–7, 21–25
44–45	all
46	1–24
47	12–25
48	all
49	1–24
50	23–25
51	1–22
52	19–25
53	all
54	1–8

Stipulation

Page	Lines
55	12–25
56	all
57	all
58	all
59	all
60	1–22
67	4–25
68	7–24
70	all
71	1–13
73	all
75–82	all
83	1–20
85	17–25
86	all
87	1–11
88	2–7

11. Exhibit No. 2.
12. This Stipulation.

(s) Richard M. Roberts
Acting Assistant Attorney General
Counsel for the Defendant-Appellant

(s) William L. Taylor, Jr.
Counsel for the Plaintiff-Appellees

September 15, 1965

[fol. 70]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16767

[File Endorsement Omitted]

HOMER O. CORRELL and DOROTHY CORRELL,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from United States District Court
for the Eastern District of Tennessee.

OPINION—Decided November 29, 1966

Before WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges.

WEICK, Chief Judge. Taxpayer, Homer O. Correll, was a salesman, employed by a wholesale grocery company. He traveled by automobile daily to various cities in behalf of his employer, to make sales to restaurants, leaving his residence early in the morning and returning in the evening.

The question in this case is whether taxpayer may deduct the cost of his meals, for which he was reimbursed by his employer, as expenses incurred in the pursuit of his trade or business "while away from home" under Section 162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a)(2) (1958).

The Commissioner of Internal Revenue disallowed the deduction and assessed a deficiency. Taxpayer paid the

tax, applied for a refund, and upon its denial sued in the District Court to recover the amount of payment.

[fol. 71] The District Judge submitted the issues to a jury, which returned a verdict in favor of taxpayer, and judgment was entered on the verdict against the Government for the full amount of the refund, plus interest.

In its appeal, the Government contends that the District Court erred in not granting its motions for a directed verdict and for judgment notwithstanding the verdict. It is the position of the Government that the cost of meals was not deductible unless the duration of travel was so extensive as to require taxpayer to obtain sleep or rest. The Government concedes that if he had remained away from home overnight, he would have been entitled to the deduction for lodging and meals.

The facts were not in dispute. Taxpayer lived in Fountain City, Tennessee, which is a suburb of Knoxville. It is located about forty-five miles from Morristown, Tennessee, which was the location of the place of business of his employer. Taxpayer's territory included the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette, and Jellico, all of which were located in eastern Tennessee. Taxpayer's employer required him to be in his territory at the beginning of the business day. To do so he had to arise at 4:30 o'clock A.M. in order to drive the necessary distance and to arrive in his territory at the required time. He was required to eat his breakfast and lunch at customers' restaurants, where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 5:30 o'clock P.M.

Taxpayer's employer reimbursed him for his expenses incurred for breakfasts and lunches. The Government contends that the amount of the reimbursement should be included in his income. It argues that no deduction for personal living expenses is allowed. 26 U.S.C. § 262 (1958). It states that most people engaged in business eat one or more meals away from home each day and are allowed no deduction therefor.

[fol. 72] The Commissioner has for many years applied the "overnight rule" as the test of deductibility of ex-

penses incurred for meals on business trips.[1] It was not until 1958, however, that regulations were adopted which mentioned for the first time the word *overnight*.[2]

The Tax Court has supported the Commissioner's view in a number of cases.[3] Other Courts have not.

The closest appellate case in point is *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962). In that case the taxpayer was in the contracting business in Washington, Iowa. He was held to have the right to deduct the cost of his meals on business trips away from the area of Washington, even though he returned home on the same day. The Court construed the plain language of the statute to mean what it says and held that the Commissioner could not amend it by the insertion of the words "over night."

The Eighth Circuit adhered to the same rule in *United States* v. *Morelan*, 356 F.2d 199, 208-210 (1965). Other cases which have disapproved the overnight test are: *Williams* v. *Patterson*, 286 F.2d 333 (5th Cir. 1961) (expenses incurred by railroad conductor during layover); *Chandler* v. *Commissioner*, 226 F.2d 467 (1st Cir. 1955) (travel expenses); *Scott* v. *Kelm*, 110 F.Supp. 819 (D.C. Minn. 1953) (automobile and travel expenses).

The theory of Section 162(a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an [fol. 73] expense incurred in producing income. The Commissioner's "overnight" or "sleep or rest" rules bear no

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[1] 4A Mertens, Law of Federal Income Taxation, p. 345.

[2] Reg. §§ 1.162-17(b)(3)(ii), 1.162-17(b)(4) and 1.162-17(c)(2).

[3] *Mortrud* v. *Commissioner*, 44 T.C. 208 (1965); *Armstrong* v. *Commissioner*, 43 T.C. 733 (1965); *Smith* v. *Commissioner*, 33 T.C. 861 (1960); *Winn* v. *Commissioner*, 32 T.C. 220 (1959); *Herrin* v. *Commissioner*, 28 T.C. 1303 (1957); *Osteen* v. *Commissioner*, 14 T.C. 1261 (1950). However, in *Bagley* v. *Commissioner*, 46 T.C. 176 (1966) the Tax Court reconsidered its prior decisions and allowed a deduction for expense of meals incurred on business trips which did not last overnight. In stating that it would no longer apply the overnight rule in all situations the Tax Court, relying on *Hanson* v. *Commissioner*, 298 F.2d 391 (8th Cir. 1962), decided to view each case in the future on its own facts.

rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute. While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary.

Under our ruling, the trial court could have directed a verdict in favor of the plaintiffs. It was not error for him to deny the Government's motions for a directed verdict and for judgment notwithstanding the verdict.

Affirmed.

[fol. 74]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,767

[File Endorsement Omitted]

HOMER O. CORRELL and DOROTHY CORRELL,
PLAINTIFFS-APPELLEES

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

BEFORE: WEICK, Chief Judge, EDWARDS and PECK, Circuit Judges.

JUDGMENT—Filed November 29, 1966

APPEAL from the United States District Court for the Eastern District of Tennessee

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

[fol. 75]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 76]

SUPREME COURT OF THE UNITED STATES

No. 1334, October Term, 1966

UNITED STATES, PETITIONER

v.

HOMER O. CORRELL, ET UX

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 267988 1015

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (App. A, *infra*, pp. 9–12) is reported at 369 F. 2d 87.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1966 (App. A, *infra*, p. 13). By order of Mr. Justice Stewart, dated February 24, 1967, the time for filing a petition for a writ of certiorari was extended to and including April 28, 1967.

QUESTION PRESENTED

A salesman daily travelled by automobile on behalf of his employer to various towns and cities around his residence, usually covering 150 to 175 miles per day. He generally left his residence at 5:00 a.m. and returned at 5:30 p.m. The question presented is whether the amounts he expended for breakfast and lunch while on the road constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" within the meaning of 1954 Code § 162(a)(2) or nondeductible "personal" or "living" expenses under Code § 262.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *
>
> * * * * *
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

Respondent[1] was a salesman employed by a wholesale grocery company with its principal place of business at Morristown, Tennessee. During the years 1960 and 1961, he traveled by automobile daily to various nearby towns and cities, where he sold his employer's goods to restaurants and other customers. On these trips, respondent usually left his residence in Fountain City, Tennessee, at about 5:00 a.m., drove for an hour or more and ate breakfast at a customer's place of business on his route for that day. He then carried on his sales activities until about 2:00 p.m., when he ate lunch, again at a customer's place of business. He finished his work schedule about 3:30 or 4:00 p.m., and returned to his residence about 5:30 p.m. He generally traveled a total of 150 to 175 miles daily. Respondent usually informed his employer in advance as to which customers' restaurants he would frequent each day, so that his employer could call him, if necessary, during his breakfast and lunch periods. Respondent's employer reimbursed him as well as its other salesmen for expenses incurred on their sales routes, including the actual cost of their meals. (App., *infra*, pp. 9–11; R. 45a–49a, 54a.)[2]

The Commissioner of Internal Revenue refused to allow respondent to deduct the cost of his meals eaten while traveling on his route. Respondent paid the resulting deficiency and sued for a refund. The jury

[1] Mrs. Correll is a party to this action only because joint return were filed; Mr. Correll will be referred to as respondent.

[2] "R." references are to the joint appendix filed by the parties in the court of appeals.

found for him. In a motion for a directed verdict and a motion for judgment notwithstanding the verdict, the government raised the question whether meal expenses of this type were non-deductible as a matter of law under § 162(a)(2) of the Code. The district court denied both motions. The Court of Appeals for the Sixth Circuit affirmed, rejecting the Commissioner's long-standing rule that the cost of meals incurred while traveling on business is not deductible unless the taxpayer remained away from home "overnight" (App., *infra*, pp. 11–12).

REASONS FOR GRANTING THE WRIT

1. The decision of the Sixth Circuit rejecting the Commissioner's "overnight" rule is in conflict with the decision of the Court of Appeals for the First Circuit in *Bagley* v. *Commissioner*, decided March 15, 1967 (App. B, *infra*, pp. 14–23), although in accord with *Hanson* v. *Commissioner*, 298 F. 2d 391 (C.A. 8), and *United States* v. *Morelan*, 356 F. 2d 199, 208–210 (C.A. 8).

The taxpayer in the *Bagley* case was a consulting engineer. His work for various power companies in the New England area frequently required him to travel to various towns located between 30 and 75 miles from his home. Typically, he left home at about 6:00 a.m. and returned at 10:00 p.m., eating three meals while traveling. The Commissioner's long-standing position is that a taxpayer has not incurred a traveling expense "away from home" unless his trip was of such duration that he was away from home overnight (or, alternatively, that he found it necessary to pause for sleep or rest) and thus that he in

all probability incurred lodging expenses. The First Circuit denied the claimed deduction on the ground that the Commissioner's long-standing position was a reasonable interpretation of the "away from home" requirement of § 162(a)(2). Recognizing the square conflict created by its decision in *Bagley,* the First Circuit criticized the observation of the court of appeals in the instant case "that [creating a workable standard for meal expense deductions] lies with Congress and not with the judiciary" (App. A, *infra,* p. 12), pointing out that the Treasury's sleep-or-rest rule "has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself" (App. B, *infra,* p. 17).

2. The long-standing "overnight-sleep-or-rest" rule, rejected by the court below but upheld in *Bagley,* constitutes a rational and administratively practicable reconciliation of § 262 of the 1954 Code, which proscribes income tax deductions for personal living expenses, with § 162(a)(2), which allows as a deduction the entire amount of expenses incurred for meals and lodging while traveling away from home in the pursuit of a trade or business. As its history demonstrates, § 162(a)(2)'s predecessor was designed to give a deduction to a taxpayer whose business trips required him to incur expenses which duplicated or exceeded his normal daily living expenses. The cost of a night's lodging while away from home on a business trip obviously duplicates the personal expense incurred by the taxpayer in maintaining his family residence. The cost of meals, on the other

hand, seldom involves a complete duplication of the taxpayer's normal personal expenses for food and drink, and such expenses may or may not exceed his usual meal expenditures. This is particularly so with lunches; there is no reason for denying a taxpayer a deduction for lunches eaten at a restaurant near his office, while at the same time permitting him or another taxpayer to deduct the full cost of lunches eaten on afternoon business trips to nearby towns, even though the lunch in the nearby town may cost no more than the lunch near his office.

Accordingly, the Commissioner has for more than 25 years interpreted § 162(a)(2) as permitting a deduction for meal expenses only when the taxpayer has been away from home overnight or for a sufficiently long period that he had to stop for sleep or rest, and thus is likely to incur duplicated expenses for lodging.[3]

Until 1962, the Commissioner's position on meals was uniformly accepted by every court which had con-

[3] I.T. 3395, 1940–2 Cum. Bull. 64; Rev. Rul. 190, 1953–2 Cum. Bull. 303, 305; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75, 77–81; Rev. Rul. 55–109, 1955–1 Cum. Bull. 261, 262; Rev. Rul. 56–508, 1956–2 Cum. Bull. 126; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 61–67, 1961–1 Cum. Bull. 25; Rev. Rul. 61–221, 1961–2 Cum. Bull. 34; Rev. Rul. 63–82, 1963–1 Cum. Bull. 33; Rev. Rul. 63–239, 1963–2 Cum Bull. 87; Treas. Regs. (under the 1954 Code), §§ 1.162–17(b)(3)(ii) and 1.162–17(c)(2).

The sleep-or-rest qualification was added to the "overnight" rule in order to cover employees, such as trainmen, who, because of their long hours of work, incur expenses, sometimes during the day, in order to pause for sleep or rest. See *Williams* v. *Patterson*, 286 F. 2d 333 (C.A. 5); Rev. Rul. 61–221, 1961–2 Cum. Bull. 34.

sidered it.[4] Moreover, the Committee Reports to the 1954 Code demonstrate that Congress was well aware of the Commissioner's long-standing position that in order for such expenses to be deductible the taxpayer must be "away from home *overnight.*" S. Rep. No. 1622, 83d Cong., 2d Sess., p. 9; H. Rep. No. 1337, 83d Cong., 2d Sess., p. 9 (emphasis added). See also S. Rep. No. 1622, *supra,* p. 191, and H. Rep. No. 1337, *supra,* pp. A39–A40, also using the phrase "away from home *overnight*" (emphasis added).[5] However, in 1962 the Court of Appeals for the Eighth Circuit rejected the Commissioner's well-accepted position (*Hanson* v. *Commissioner,* 298 F. 2d 391) and the Sixth Circuit has now reached the same result in the instant case.

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[4] *Hathaway* v. *Commissioner*, decided November 14, 1944 (P–H Memo T.C., par. 44,369); *Drill* v. *Commissioner*, 8 T.C. 902; *Blatt* v. *Commissioner*, decided February 10, 1947 (P–H Memo T.C., par. 47,020); *Fairley* v. *Commissioner*, decided August 4, 1948 (P–H Memo T.C., par. 48,144); *Summerour* v. *Allen*, 99 F. Supp. 318, 320 (M.D. Ga.); *Osteen* v. *Commissioner*, 14 T.C. 1261; *Herrin* v. *Commissioner*, 28 T.C. 1303; *Fogle* v. *Commissioner*, decided November 10, 1959 (P–H Memo T.C., par. 59,214); *Smith* v. *Commissioner*, 33 T.C. 861; *Cummings* v. *Commissioner*, decided December 7, 1961 (P–H Memo T.C., par. 61,330); *Armstrong* v. *Commissioner*, 43 T.C. 733; *Montrud* v. *Commissioner*, 44 T.C. 208; see also *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926, affirming a Tax Court decision of March 1, 1951 (P–H Memo T.C., par. 51,058).

[5] Moreover, as the First Circuit indicated in *Bagley*, the statute itself may require the result reached by the Commissioner *i.e.*, it may require the construction that a taxpayer's travels are not "away from home" in the statutory sense unless he requires both "meals and lodging" (App. B, *infra*, p. 20).

3. The issue in this case is of importance to hundreds of thousands of taxpayers whose pursuit of a trade or business requires frequent inter-city travel in the space of a single day. The decision below, rejecting the Commissioner's long-standing "overnight-sleep-or-rest" rule and suggesting no practical standard in its stead, will stimulate claimed income tax deductions for meal expenses that will have a substantial fiscal impact and will result in a great volume of costly and time-consuming litigation. This Court should therefore resolve the clear conflict among the circuits on the issue.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JACK S. LEVIN,
Assistant to the Solicitor General.

GILBERT E. ANDREWS,
EDWARD LEE ROGERS,
Attorneys.

APRIL 1967.

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[6] The instant case does not involve the question presented by *Commissioner* v. *Stidger*, decided March 20, 1967 (No. 173, this Term), *i.e.*, whether a taxpayer's "home" for tax purposes is his principal place of business or his residence. Regardless of whether respondent's "home" was Morristown (his employer's principal place of business) or Fountain City (where he resided), he did not incur the expenses here in question (for breakfast and lunch) "while away from" either place within the meaning of § 162(a)(2).

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 16767

HOMER O. CORRELL and DOROTHY CORRELL, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Decided November 29, 1966.

Before WEICK, *Chief Judge;* EDWARDS and PECK, *Circuit Judges.*

WEICK, *Chief Judge.* Taxpayer, Homer O. Correll, was a salesman, employed by a wholesale grocery company. He traveled by automobile daily to various cities in behalf of his employer, to make sales to restaurants, leaving his residence early in the morning and returning in the evening.

The question in this case is whether taxpayer may deduct the cost of his meals, for which he was reimbursed by his employer, as expenses incurred in the pursuit of his trade or business "while away from home" under Section 162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a)(2) (1958).

The Commissioner of Internal Revenue disallowed the deduction and assessed a deficiency. Taxpayer paid the tax, applied for a refund, and upon its denial sued in the District Court to recover the amount of payment.

The District Judge submitted the issues to a jury, which returned a verdict in favor of taxpayer, and judgment was entered on the verdict against the Government for the full amount of the refund, plus interest.

In its appeal, the Government contends that the District Court erred in not granting its motions for a directed verdict and for judgment notwithstanding the verdict. It is the position of the Government that the cost of meals was not deductible unless the duration of travel was so extensive as to require taxpayer to obtain sleep or rest. The Government concedes that if he had remained away from home overnight, he would have been entitled to the deduction for lodging and meals.

The facts were not in dispute. Taxpayer lived in Fountain City, Tennessee, which is a suburb of Knoxville. It is located about forty-five miles from Morristown, Tennessee, which was the location of the place of business of his employer. Taxpayer's territory included the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette, and Jellico, all of which were located in eastern Tennessee. Taxpayer's employer required him to be in his territory at the beginning of the business day. To do so he had to arise at 4:30 o'clock A.M. in order to drive the necessary distance and to arrive in his territory at the required time. He was required to eat his breakfast and lunch at customers' restaurants, where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 5:30 o'clock P.M.

Taxpayer's employer reimbursed him for his expenses incurred for breakfasts and lunches. The Government contends that the amount of the reim-

bursement should be included in his income. It argues that no deduction for personal living expenses is allowed. 26 U.S.C. § 262 (1958). It states that most people engaged in business eat one or more meals away from home each day and are allowed no deduction therefor.

The Commissioner has for many years applied the "overnight rule" as the test of deductibility of expenses incurred for meals on business trips.[1] It was not until 1958, however, that regulations were adopted which mentioned for the first time the word *overnight*.[2]

The Tax Court has supported the Commissioner's view in a number of cases.[3] Other Courts have not.

The closest appellate case in point is *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962). In that case the taxpayer was in the contracting business in Washington, Iowa. He was held to have the right to deduct the cost of his meals on business trips away from the area of Washington, even though he returned home on the same day. The Court construed the plain language of the statute to mean what it says

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[1] 4A Mertens, Law of Federal Income Taxation, p. 345.

[2] Reg. §§ 1.162–17(b)(3)(ii), 1.162–17(b)(4) and 1.162–17(c)(2).

[3] *Mortrud* v. *Commissioner*, 44 T.C. 208 (1965); *Armstrong* v. *Commissioner*, 43 T.C. 733 (1965); *Smith* v. *Commissioner*, 33 T.C. 861 (1960); *Winn* v. *Commissioner*, 32 T.C. 220 (1959); *Herrin* v. *Commissioner*, 28 T.C. 1303 (1957); *Osteen* v. *Commissioner*, 14 T.C. 1261 (1950). However, in *Bagley* v. *Commissioner*, 46 T.C. 176 (1966) the Tax Court reconsidered its prior decisions and allowed a deduction for expense of meals incurred on business trips which did not last overnight. In stating that it would no longer apply the overnight rule in all situations the Tax Court, relying on *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962), decided to view each case in the future on its own facts.

and held that the Commissioner could not amend it by the insertion of the words "over night."

The Eighth Circuit adhered to the same rule in *United States* v. *Morelan,* 356 F. 2d 199, 208–210 (1965). Other cases which have disapproved the overnight test are: *Williams* v. *Patterson,* 286 F. 2d 333 (5th Cir. 1961) (expenses incurred by railroad conductor during layover); *Chandler* v. *Commissioner,* 226 F. 2d 467 (1st Cir. 1955) (travel expenses); *Scott* v. *Kelm,* 110 F. Supp. 819 (D.C. Minn. 1953) (automobile and travel expenses).

The theory of Section 162(a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an expense incurred in producing income. The Commissioner's "overnight" or "sleep or rest" rules bear no rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute. While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary.

Under our ruling, the trial court could have directed a verdict in favor of the plaintiffs. It was not error for him to deny the Government's motions for a directed verdict and for judgment notwithstanding the verdict.

Affirmed.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

NOVEMBER 29, 1966.

APPENDIX B

United States Court of Appeals for the First Circuit

No. 6812

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM A. BAGLEY, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

[46 T.C. 176]

March 15, 1967.

Before ALDRICH, *Chief Judge*; MCENTEE and COFFIN, *Circuit Judges.*

ALDRICH, *Chief Judge.* Taxpayer, a consulting engineer, maintained his office at his home in Milford, New Hampshire. During the taxable years 1960 and 1961 he was employed from time to time by various power companies in the New England area on a per diem basis. On many of these days he left home early, ate breakfast on the way, ate lunch at work, and stopped to dine on the drive back. His employers' places of business were from thirty to seventy-five miles distant, and taxpayer normally reached home about ten P.M. The sole question is whether he can deduct the cost of these meals [1] as "traveling expenses (including the entire amount expended for meals and

[1] Taxpayer sometimes remained at his place of work overnight. The Commissioner does not question the propriety of deductions for meals and lodging on those occasions.

lodging) while away from home in the pursuit of a trade or business." 1954 I.R.C. § 162(a)(2).[2]

For the 45 years that this provision has been on the books in substantially its present form the Commissioner has sought to apply a rule of thumb which, in general, has found favor with the Tax Court. See *e.g., Al J. Smith,* 1960, 33 T.C. 861; *Louis Drill,* 1947, 8 T.C. 902. Some other courts have been critical. See, *e.g., Hanson* v. *Commissioner, infra; Correll* v. *United States, infra.* We cannot find, however, that these courts have substituted anything better. Rather, we believe that to this area of almost unlimited factual variations their admittedly subjective approach brings neither clarification nor ease of application nor, even, overall fairness.

The Commissioner's rule was originally known as the overnight rule. Travel did not qualify unless the taxpayer was away from home overnight.[3] As a result of the decision in *Williams* v. *Patterson,* 5 Cir., 1961, 286 F. 2d 333, which the Commissioner accepted, this became known as the necessary sleep or rest rule—a trip long enough to require interruption for rest during the day is equivalent to being away overnight.[4]

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[2] This section was amended in 1962, but in a respect not presently pertinent. Revenue Act of 1962, § 4(b), 76 Stat. 960.

[3] See discussion in *Kenneth Waters,* 1949, 12 T.C. 414, 417. *Allan L. Hanson,* 1960, 35 T.C. 413, *rev'd, Hanson* v. *Commissioner,* 8 Cir., 1962, 298 F. 2d 391.

[4] In *Williams* the taxpayer was a railroad conductor. He left his home in Alabama every morning at about 6:45 A.M. and boarded a train which arrived in Atlanta at 12:15 P.M. He was then off duty until 6:15 P.M., at which time he departed on the return trip and arrived home at about midnight. During the stopover in Atlanta the taxpayer regularly had lunch at a hotel, rented a room and slept for several hours, and had dinner. The question at issue was whether or not his rest was "necessary," since at that time Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 78, permitted a deduction to a railway em-

We in no way disagree with *Williams*. It marked, however, the beginning of a broader attack on the rule. In *Hanson* v. *Commissioner,* 8 Cir., 1962, 298 F. 2d 391, the taxpayer was in the construction business. He was employed contemporaneously at several different job sites at substantial distances from his home. He normally checked in at his office in the morning, and then visited the various jobs, usually returning late at night. The court concerned itself principally with ruling that the overnight rule was without legal basis. Having determined this, it then decided the case on the ground that *Williams* v. *Patterson* justified the deduction of the lunches and dinners "albeit that the expense is 'personal in nature.'" *Id.* at 397. The court did not discuss the factual complications involved, or, apparently, note that *Williams* v. *Patterson,* where there was a substantial rest period involved, was a very different case.[5]

In the case at bar the Tax Court decided to follow *Hanson*. One judge, in concurring on special grounds, expressed what seems to us a poignant regret, that neither the *Hanson* decision nor the Tax Court in the present case had offered any guiding principles to take the place of the Commissioner's rule.

The most recent blow against the Commissioner's rule was struck in *Correll* v. *United States,* 6 Cir.,

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ployee who was released from duty to obtain "necessary sleep." The Commissioner contended that such rest was only necessary when required by the employer. The court rejected this to rule that when it was reasonable for the employee, due to the hours of his employment, to seek rest during his hours off a deduction would be permitted. The Commissioner acquiesced in this holding in Rev. Rul. 61-221, 1961-2 Cum. Bull. 34. See also I.T. 3395, 1940-2 Cum. Bull. 64.

[5] The court also relied upon our case of *Chandler* v. *Commissioner*, 1955, 226 F. 2d 467, which, for reasons pointed out *infra*, n. 11, we believe was wrongly decided.

1966, 369 F. 2d 87, 90. In permitting a traveling salesman who returned nightly for dinner to deduct his breakfast and lunch on the road, the court conceded that "the rule adopted by Appellate Courts may not always work satisfactorily," but concluded that "the remedy lies with Congress and not with the judiciary."

With all respect, we suggest that the Commissioner's rule has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself. Furthermore, we believe that the so-called "rule adopted by Appellate Courts" is not a rule at all, and not even a guide.

We start with the principle that both travel and meals away from home are not deductible if they are personal, as distinguished from business, expenses. 1954 I.R.C. § 262. If a taxpayer chooses to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience. *Commissioner* v. *Flowers,* 1946, 326 U.S. 465.[6] It is equally clear that a commuter cannot deduct his lunch. *Cf. Fred M. Osteen,* 1950, 14 T.C. 1261. *But cf. Emmert* v. *United States,* S.D. Ind., 1955, 146 F. Supp. 322. Under such circumstances it would seem unfair to allow a deduction for lunch to a man whose business requires him to spend his eight hour day on the road, even though in a sense he is traveling. We have held against such a taxpayer. *Amoroso* v. *Commissioner,* 1 Cir., 1952, 193 F. 2d 583, *cert. den.* 343 U.S. 926 (traveling salesman). Nor do we suppose, if a commuter were required to work late

[6] A taxpayer who has more than one place of business could not choose to live at all of them. In that event at least some of the travel must be a business necessity. *Cf. Crowther* v. *Commissioner*, 9 Cir., 1959, 269 F. 2d 292; see *Chandler* v. *Commissioner*, 1 Cir., 1955, 226 F. 2d 467, discussed *infra*, n. 11.

at his place of business, that any court would distinguish between his lunch and his supper. *Cf. Jerome Mortrud,* 1965, 44 T.C. 208; *Fred G. Armstrong,* 1965, 43 T.C. 733; *Louis Drill,* 1947, 8 T.C. 902.

While, as has been pointed out, there are certain travel and other expenses of a purely personal nature, the manifest statutory purpose is to permit deductions when business activities require duplication. Lodging away from home may well be all extra expense.[7] However, even though a meal away from home may be more expensive, presumptively it is not all added cost. And, in fact, prior to the enactment of what is now section 162(a)(2) in 1921, the Commissioner had promulgated a regulation which permitted the deduction of only that part of the expenses for meals and lodging incurred while traveling "in an amount in excess of any expenditures ordinarily required for such purposes when at home." Treas. Reg. art. 292 (1920 ed.). The difficulties involved in calculating the "excess" under this regulation proved so onerous that the Treasury itself asked Congress to grant a deduction for the "entire amount" of such expenditures for meals and lodging.[8] Accordingly section 214(a)(1) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, for the first time contained as a subcategory of ordinary and necessary business expenses the language that is now section 162(a)(2). Compare section 214 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057. Hence taxpayers who incur meal expenses while traveling

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[7] *But cf. James* v. *United States*, 9 Cir., 1962, 308 F. 2d 204, where taxpayer, an unmarried traveling salesman, lived in hotels the year around. Properly, no deduction was allowed, on the theory that he had no "home" to be away from.

[8] See Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 2 and 13, 1921 (Confidential Committee Print, subsequently released for publication), pp. 50, 234–35.

away from home now receive a tax windfall in that, unlike taxpayers who pay for meals while "at home," they are permitted to deduct some expenses that are incontestably "personal" as that term is used in section 262, *i.e.*, that portion of their meal expenses that they would have incurred had they not been traveling.

This codified accounting convenience intensifies the windfall which accrues to taxpayers like Correll and Hanson as against such taxpayers as Osteen and Amoroso. It may well be the reason why the Commissioner sought to invoke the overnight rule. In any event, we think it a good reason to do so. We see no justification for allowing salesman Correll two meals, and salesman Amoroso none. Nor would we give Amoroso one and commuter Osteen none. Equally, we see no reason, to take a frequently referred to hypothetical, why a man who makes a quick trip to Washington, missing neither breakfast nor dinner at home, should be allowed his lunch merely because he is traveling more miles than Amoroso, the salesman who travels locally. The courts in *Hanson* and *Correll* do not discuss this inevitable question. We think, at best, that all they do is to push the dividing line somewhere else, with no avoidance of the ultimate necessity, and difficulty, of drawing it. At worst, they make the drawing of it considerably harder.[9]

We believe that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot luck in the courts, is to accept the Commissioner's sleep or rest rule. If in some instances it be thought illogical, it is not uninter-

[9] It is not at all clear, for example, whether the court in *Hanson* would be prepared to grant a deduction to Amoroso. See 298 F. 2d at 397.

esting to note that the very circuit which has been relied on to justify a substantial assault on the Commissioner's rule is the one which has most succinctly pointed out that fairness and administrative consistency in this area are more important than the total pursuit of logic. See *Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F. 2d 496, 503–05.

Nor do we find the Commission's rule wide of the mark as a matter of statutory construction. Admittedly all travel is not "away from home." Not only have the courts recognized this even when travel was not strictly commuting, *Clarence J. Sapp,* 1961, 36 T.C. 852, *aff'd per curiam,* 5 Cir., 309 F. 2d 143, but, were the contrary interpretation given, in qualifying travel as "away from home" the statute would be redundant. Since a line must be drawn somewhere, it seems not unreasonable to say that the test of whether travel is away from home is whether it is so extensive as to require "lodging," *viz.,* that "meals and lodging" be read in the conjunctive. This construction arguably finds some historical corroboration.[10] We believe, in any event, that it is a reason-

[10] The Treasury Regulation in response to which the deduction for the entire amount of travel expenses was originally passed consistently used language like "railroad fares, and meals and lodging" as though meals and lodging were to be read together. Had it been intended that the words should be read disjunctively the phrase "railroad fares, meals, and lodging" would have been more appropriate. Treas. Reg. art. 292 (1920 ed.). Likewise, all versions of the statute since its enactment in 1921 have used the terms in conjunction in permitting the deduction of the "entire amount" expended on them. If this is not intended to suggest a connection between them it makes little sense, since even under the Commissioner's original regulation permitting the deduction of only the excess of the "entire amount" of expenditures, lodging would have been ordinarily deductible because it was a duplicated expense. The only case in which this would not hold true would be where one's

able compromise in what seems otherwise an impossible situation.

It would be an insuperable objection to the sleep or rest rule if not merely meals, but also business transportation costs, were deductible only if incurred in connection with lodging. However, in spite of the fact that section 162(a)(2) links the deduction of travel expenses with the deduction of meal costs, such correlation has not been uniformly required. *E.g.*, *Summerour* v. *Allen*, M.D. Ga., 1951, 99 F. Supp. 318; *Joseph M. Winn*, 1959, 32 T.C. 220. In some circumstances transportation may be an ordinary and necessary expense under the general provisions of section

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abode was sufficiently permanent to constitute a "home" and yet cost less to maintain when the taxpayer was away. It would seem that such a situation is sufficiently unlikely to occur, or if it does occur sufficiently unlikely to amount to any substantial avoidance of duplication, to indicate that it was not what Congress was primarily concerned with treating when it drafted the statute in question. Accordingly, if this analysis is correct the purpose of linking meals and lodging, rather than merely specifying the deduction of the "entire amount" of meals alone, is to indicate that a deduction is to be granted when expenses for both are incurred.

Admittedly when Congress enacted section 62(2)(B) in 1954, 1954 I.R.C. § 62(2)(B), providing for the deduction of travel expenses from gross income, the wording "expenses of travel, meals, and lodging" was used. However, the committee reports on that section also contain the only specific indication that Congress was aware of and accepted the Commissioner's interpretation of the statutory language. They state, "At present, business transportation expenses can be deducted by an employee * * * only if they are reimbursed by the employer or if they are incurred while he was "*away from home overnight.*" S. Rep. No. 1622, 83d Cong., 2d Sess., 9, 169; H.R. Rep. No. 1337, 83d Cong., 2d Sess., 9, A19. (Ital. suppl.) Therefore it seems reasonable to conclude, at the least, that the change in phraseology was not intended to alter the previous meaning of section 162(a)(2).

162. *E.g., Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F. 2d 496; *Clarence J. Sapp, supra. Cf.* I.R.C. § 62(2)(C). *But cf. Crowther* v. *Commissioner,* 9 Cir. 1959, 269 F. 2d 292; *Rice* v. *Riddell,* S.D. Calif., 1959, 179 F. Supp. 576.[11] The fact that some trans-

[11] A decision involving transportation only is our case of Chandler v. Commissioner, 1 Cir., 1955, 226 F. 2d 467. There taxpayer had two jobs, in two different places. We held that transportation to one was commuting and not deductible, but that the cost of traveling to the second could be deducted. Under ordinary circumstances this would be a sound result—the cost of transportation to the second job would seem a necessary and proper business expense. *Steinhort* v. *Commissioner, supra.* The difficulty is that taxpayer had taken the standard deduction, which at that time included, and therefore prevented additional itemization of, all "necessary and proper" business expense. Accordingly, Chandler had, in effect, received this travel deduction, if it were to be so categorized. Consequently, in order to permit taxpayer to recover, the court had to hold that travel to this second job, although, strictly, it was no greater in mileage or hours than commuting to the first, was "travel away from home," this being a deduction not included in the standard deduction.

We must agree with the Commissioner that this was an instance of a hard case making bad law. At that time the 1939 Code made a totally arbitrary distinction between employee taxpayers who incurred transportation expenses for which they were not reimbursed and those who were reimbursed. 1939 I.R.C. §§ 22(n) (2), (3). The former could deduct transportation expenses from gross income and take the standard deduction as well only if they were travel expenses incurred away from home on business, while the latter could take both deductions for all legitimate business transportation expenses. Additionally, self-employed taxpayers could also take both deductions. 1939 I.R.C. § 22(n)(1). Possibly because such a distinction between similarly situated taxpayers was grossly discriminatory the court strained to construe the transportation as involving travel away from home in order to rectify the inequity. This discrimination was eliminated by the enactment of section 62(2)(C) of the 1954 I.R.C. and the transportation expenses incurred by Chandler would today be deductible from gross

portation costs are deductible even where meals would not be not only removes the necessity of making a liberal interpretation of section 162(a)(2), but in itself suggests that "travel away from home" with its specific inclusion of meals and lodging, means travel in a substantial sense and not a diurnal round starting and ending at home.

On this basis the present taxpayer is not entitled to the deduction. Nor do we find it an answer to say that had he chosen to stay overnight, instead of coming home late, the result would have been otherwise. Not only in a rule of thumb, but in any application of principles there has to be a dividing line, and in as complex an area as this one the line is bound to be indistinct. It can become totally lost by talking equivalents.

We can think of no sharper place to draw the line, and since we also think of no better one, we accept what has long been the Commissioner's.

The decision of the Tax Court is vacated and the cause remanded for further proceedings.

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income under this section. However, we must conclude that the decision in *Chandler* is incorrect as a guide to the construction of section 162(a)(2). Compare *Kenneth Waters*, 1949, 12 T.C. 414 (dissenting opinion).

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

MAY 31 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~1334~~ 113

UNITED STATES OF AMERICA, - - Petitioner,

versus

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MEMORANDUM FOR HOMER O. CORRELL AND DOROTHY CORRELL IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

UNITED STATES OF AMERICA, - - *Petitioner,*

v.

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MEMORANDUM FOR HOMER O. CORRELL AND DOROTHY CORRELL IN OPPOSITION.

The question presented in this case is whether the amount of money expended by Homer O. Correll for breakfast and lunch while on the road in pursuit of his business constitutes deductible traveling expenses incurred while away from home in the pursuit of a trade or business within the meaning of 1954 Code Section 162(a)(2) or nondeductible personal or living expenses under Code Section 262.

The facts show that the respondent, Homer O. Correll, lived in Fountain City, Tennessee, which is a suburb of Knoxville. During the years in issue, the

respondent was a traveling salesman for Hale Brothers, Inc., a Tennessee Corporation with principal offices in Morristown, Tennessee, and which had, and still has, as its principal business the distribution of fruits, vegetables, and institutional canned goods and frozen foods throughout East Tennessee, Kentucky and the fringe of Western North Carolina. The respondent's territory covered a portion of East Tennessee and included the cities of Madisonville, Englewood, Etowah, Athens, Sweetwater, Lake City, Caryville, J[illegible]sboro, LaFollette, and Jellico. Since respondent's employer required him to be in his territory at the beginning of a business day, it was necessary for the respondent to arise at 4:30 A.M. in order to drive the necessary distance and still arrive in his territory at the required time. On a typical day the respondent ate breakfast some fifty (50) miles from his home at a restaurant in Sweetwater, Tennessee, which restaurant is also one of the respondent's customers. Thereafter, he would call on customers in his territory until 2:00 P.M. at which time he ate his lunch at a customer's restaurant in Athens, Tennessee, which is approximately seventy-five (75) miles from respondent's home. After lunch the respondent would continue to call on customers until around 4:00 P.M. at which time he would make the return trip home arriving at approximately 5:30 P.M.

As shown above, the respondent was, without question, away from his home town and the Knoxville area in pursuit of his trade or business when he ate both breakfast and lunch.

The respondent takes the position that such meals are deductible, or that any amounts received as reimbursements for such meals are excludable from adjusted gross income, under the provisions of Sections 62 and 162 of the Internal Revenue Code of 1954. The Government contends, on the other hand, that the meals are not deductible and that any amounts received as reimbursements for such meals should be included in respondent's income.

The Government bases its entire case on the theory that before such meals are deductible, the taxpayer must be away from home *overnight*. Note, however, that there is no language in any Code Section which provides that, "while away from home," means, "while away from home 'overnight.'" This is simply an administrative interpretation by the Government which is obviously more in the nature of legislation than interpretation. How easy it would have been for Congress, in drafting the Code Sections under consideration, to have broadened the phrase "while away from home" to "while away from home overnight" if that was the congressional intent.

The Government argues in its petition that this Court should grant the Petition for a Writ of Certiorari because this case is in conflict with the decision of the Court of Appeals for the First Circuit in *Bagley* v. *Commissioner*, decided March 15, 1967. Note, however, that the case under consideration is in accord with *Hanson* v. *Commissioner*, 298 F. 2d 891 (C.A. 8th); *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8th), and also in accord with the Fifth Circuit in the

case of *Williams* v. *Patterson*, 286 F. 2d 333 (C.A. 5th), wherein the Fifth Circuit also agreed that the "overnight" rule is merely an arbitrary line-drawing, having no basis in the statute. Also note that the Tax Court of the United States has also stated that it would no longer follow the overnight rule. *Bagley* v. *Commissioner*, 46 T. C. 176 (1966).

The respondent contends that the Supreme Court should not grant the Petition for a Writ of Certiorari in the instant case since the conflict, if one exists, is not over the interpretation of the law but only over the Government's arbitrary administrative interpretation which has already been rejected by two other courts of appeals and the Tax Court of the United States. Since the law is clear, the Government's appeal for any change in the Code Sections should be to the Congress and not to the United States Supreme Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 113

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not render any opinion. The opinion of the court of appeals (R. fol. 70) is reported at 369 F. 2d 87.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1966 (R. fol. 74). By order of Mr. Justice Stewart, dated February 24, 1967, the time for filing a petition for a writ of certiorari was extended to and including April 28, 1967. The petition was filed on that date, and was granted on June 12, 1967 (R. fol. 76). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

A salesman daily traveled by automobile on behalf of his employer to various towns and cities around his residence, usually covering 150 to 175 miles per day. He generally left his residence at 5:00 a.m. and returned at 5:30 p.m. The question presented is whether the amounts he expended for breakfast and lunch while on the road constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" within the meaning of 1954 Code § 162(a)(2) or nondeductible "personal" or "living" expenses under Code § 262.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *
>
> * * * * *
>
> (26 U.S.C., 1958 ed., 162.)
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.
>
> (26 U.S.C. 262.)

STATEMENT

Respondent[1] in 1960 and 1961 was one of about 16 salesmen who worked for Hale Brothers, Inc., a wholesale grocery company with headquarters in Morristown, Tennessee. Each salesman covered part of a territory that ranged over the eastern third of Tennessee, southeastern Kentucky, and the southwestern corner of Virginia. One or two called only on accounts in their home towns. A few others—those covering the Kentucky territory—occasionally made an overnight sales trip. But most—including petitioner—would leave home each day early in the morning, make calls in several cities and towns, and return home before dinner. (R. 25a–32a, 37a–38a, 40a, 54a, 66a.)

Hale required each salesman to have breakfast and lunch at specified times and places on his route, so as to be available for telephone calls from Hale's office. Hale's policy was to reimburse every salesman, even if he never left his hometown, for his out-of-pocket expenses, including the cost of breakfast and lunch. (R. 27a–29a, 34a–39a, 41a–45a, 47a–48a.)[2]

Petitioner lived in Fountain City, Tennessee—about 50 miles from Morristown. He was assigned two areas,

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[1] Mrs. Correll is a party to this action only because joint returns were filed; Mr. Correll will be referred to as respondent.

[2] The salesmen were told when hired that the company would reimburse actual daily meal expenses (R. 40a). Hale also provided each with, and paid the operating expenses of, an automobile (R. 27a–28a, 43a, 57a–58a). Respondent excluded the reimbursement of the latter expenses from his taxable income, treatment the Commissioner agrees was proper under Sections 62(2)(C) and 162(a) of the 1954 Code.

one southwest and the other east of Fountain City. His routes required him to call on each customer in his area once or twice a week. He left Fountain City at about 5 a.m., drove an hour or more, and ate breakfast at the first stop on his route for that day. He then pursued his sales route until about 2 p.m., when he ate lunch, again at a customer's restaurant. Although he seldom was more than 55 miles from his home, he generally drove a total of 150 to 175 miles daily. He typically finished his daily schedule by 4 p.m., transmitted his orders to Morristown, and returned to his home in Fountain City by 5:30 p.m. (R. 43a–55a.)

The Commissioner of Internal Revenue required respondent to include in his gross income the amount he received from Hale as reimbursement of the cost of meals he ate while traveling his routes, and denied a compensating deduction (R. 5a, 10a, 13a, 57a, 58a). Respondent paid the resulting deficiency and sued for a refund (R. 3a). The jury found for him (R. 65a). In a motion for a directed verdict and a motion for judgment notwithstanding the verdict, the Government asserted that the meal expenses as a matter of law were not deductible as expenses incurred "while away from home" because not incurred on trips requiring a stop "overnight" (R. 19a–20a).[3] The district court

[3] Respondent contended in the trial court that his meal reimbursements were excludable from gross income pursuant to Section 119 of the Code, which applies to meals "furnished * * * for the convenience of the employer * * * on the business premises of the employer * * *." The trial judge ruled against respondent (R. 58a). Respondent did not raise this contention in the court of appeals.

denied both motions (R. 21a, 56a–57a). The Court of Appeals for the Sixth Circuit affirmed (R. fol. 70).

INTRODUCTION AND SUMMARY OF ARGUMENT

Every Internal Revenue Act since the adoption of the Sixteenth Amendment has expressed the general policy now embodied in Section 262 of the Internal Revenue Code of 1954, that "personal, living, or family expenses" are not deductible. Of equal importance and longevity has been another policy, now found in Section 162(a) of the Code, that "all the ordinary and necessary expenses" of carrying on a trade or business are deductible.

The interaction of Sections 162 and 262 is highlighted in a case such as this, where a taxpayer buys a meal—plainly a "personal, living" expense—in the course of travel that is part of his income-producing work. Is a deduction allowable because the money was spent in the course of the taxpayer's business activities? Or is it not because the cost of food is an ordinary expense of everyday life?

Until 1920 it was unclear whether any deductions were allowed for meals or lodging, even if incurred during a business trip. Then the Treasury, recognizing that a portion of such expenses might be attributable to the exigencies of business travel, sought to give simultaneous recognition to both congressional policies by allowing a deduction, but only to the extent that business demands increased the cost of a given expense. The Treasury decided the resulting need to divide every businessman's meal and lodging expenses into "business" and "personal" portions was a "cumbersome" procedure. Therefore, Congress, at the sugges-

tion of the Treasury, in 1921 added to the revenue laws a deduction for "the entire amount expended for meals and lodging * * * *while away from home* in the pursuit of a trade or business" (emphasis supplied)—the language that with no presently material change now appears in Section 162(a)(2) of the Code. Thus, the administrative problem was solved—there was no further need to apportion the expense of one meal into deductible and personal parts.

The new statutory requirement clearly allowed the man who lives and normally works in one city the deduction when his business took him for several days to a distant location. On the other hand, that requirement did not permit the commuter to deduct the cost of a lunch eaten a block from his office, or the intra-city business traveler the cost of a lunch eaten on his route.

But between these extremes are taxpayers for whose circumstances there was no dispositive statutory rule and in whose cases the Commissioner had to rule in a way that accommodated the contrasting policies of Sections 162 and 262. What of the taxpayer who lives and works in Manhattan and buys lunch while on a three-hour trip to Newark? Or the salesman or doctor who spends part of his working day driving from one town to another in Westchester County? Or the New York businessman who takes a one-day trip by train to Philadelphia or by jet to Chicago?

All of these taxpayers are in essentially the same economic position as the commuter or intra-city traveler. Like them, each buys his lunch and perhaps other

food away from his abode during the course of his workday. For each, the needs of his business on a particular day determine where he eats. But none has an expense discernibly different from the commuter and the intra-city traveler—or each other. All incur their daily living expenses for meals and lodging only once, without any significant increase or duplication as the result of travel. Their experiences are thus materially different from those of the traveler who must stop for sleep or rest, and thus duplicate the substantial cost of maintaining his residence.

The Commissioner published his position in 1940, and has since consistently maintained, that the Congressional objectives would best be satisfied if a taxpayer were considered "away from home" within the meaning of Section 162(a)(2) only when on a trip requiring sleep or rest. Under those circumstances, the prohibition of Section 262 against the deductibility of a personal expense gives way to Section 162(a)(2).

In at least a dozen cases, beginning in 1944, the Tax Court consistently upheld the Commissioner's disallowance of meal expenses incurred during what were essentially one-day trips. The only Court of Appeals to review the issue agreed with the Tax Court. Congress, in drafting the 1954 Code, evidenced its familiarity with the Commissioner's interpretation, and ignored a taxpayer plea for change.

In 1962, a court of appeals for the first time allowed the deduction of meal expenses incurred on one-day trips that had not required lodging expenses. The Eighth Circuit asserted that the Commissioner's "rule

is merely an arbitrary line-drawing having no basis in the statute," and that "these cases must be decided according to their own sets of facts." *Hanson* v. *Commissioner,* 298 F. 2d 391, 397; accord, *United States* v. *Morelan,* 356 F. 2d 199, 208–210 (C.A. 8). In the present case, the Sixth Circuit followed the Eighth.

On the other hand, the First Circuit, after the decision below, ruled against a taxpayer who claimed a deduction for three meals purchased each day while on business trips, which were in mileage shorter and in hours longer than respondent's. *Commissioner* v. *Bagley,* 374 F. 2d 204, petition for certiorari pending, No. 155 this Term. That circuit saw no justification for allowing the one-day traveler to deduct his meal expenses simply because "he is traveling more miles" than the commuter. It concluded that the language of Section 162(a)(2) "means travel in a substantial sense and not a diurnal round starting and ending at home. * * * We can think of no sharper place to draw the line, and since we also think of no better one, we accept what has long been the Commissioner's." 374 F. 2d at 207–209.

This disagreement among the court of appeals brings to this Court the question whether the Commissioner's long-standing interpretation of Section 162(a)(2) should be sustained as a proper exercise of his administrative authority to interpret the Tax Code.

The Commissioner's position clearly accords with the language and purpose of the statute. Section 162(a)(2), by its terms, does not apply to all business travel, but only to travel that is "away from home." The reason for this limitation is clear enough.

Many businessmen who travel outside their home cities and return to their residences in the evenings may not travel greater distances, or incur greater living expenses, than the typical commuter, the individual who travels on business within a given metropolitan area, or the itinerant business traveler who has no permanent residence, none of whom is entitled to the benefits of the statute. The Commissioner's interpretation implements the policy of Section 262 by not allowing the deduction to all such similarly situated travelers and, at the same time, carries out the purpose of Section 162(a)(2) by granting the deduction to those taxpayers whose travel is so extensive that they must ordinarily incur the substantially increased expense of providing a temporary abode in addition to a regular residence. Further, the Commissioner's interpretation is needed to translate the generalized statutory language into a rule that is sufficiently clear and objective to be applied to the great variety of factual patterns that arise.

The views of the Sixth and Eighth Circuits, on the other hand, appear to give no cognizance to the Commissioner's authority to adopt reasonable administrative interpretations of statutory concepts in order to effectuate the underlying Congressional objectives. Nor do those courts offer any guidance as to what factors shall determine when travel takes a man "away from" his home. Instead, they would have the case of every salesman—and there are more than a million—turn on an examination of the manifold circumstances of his every day's activities—an approach that defeats the need for a clear and workable rule.

This Court should approve the Commissioner's sleep-or-rest test.

ARGUMENT

I. THE STATUTORY SCHEME PERMITS A DEDUCTION WHEN BUSINESS TRAVEL RESULTS IN EXPENSES THAT SIGNIFICANTLY DUPLICATE OR INCREASE THOSE CUSTOMARILY INCURRED

Section II B of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 167, permitted deductions for those "necessary expenses actually paid in carrying on any business,[4] *not including personal, living, or family expenses.*"[5] (Emphasis supplied.) Substantially the same

[4] All subsequent Internal Revenue statutes have similarly allowed the deduction of all ordinary and necessary expenses incurred in carrying on a trade or business. Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 214(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162, *supra*, p. 2.

[5] The prohibition against the deduction of personal, living, or family expenses has been reiterated in every subsequent Internal Revenue Statute. See Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 5(a); Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 215(a); Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 215(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 215(a)(1); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 215(a)(1); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 24(a)(1); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 24(a)(1); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec.

language appeared in the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 5, and the Revenue Act of 1918, c. 18, 40 Stat. 1957, Sections 214 and 215. No section expressly dealt with travel expenses, or with any other business occasion that could result in a meal or lodging expenses.

In 1919, the Commissioner sought to define administratively those travel expenses that were deductible business expenses rather than nondeductible "personal" or "living" expenses. He first took the position that the only deductible expense was the cost of transportation, and that meal and lodging expenses were not deductible. Treasury Regulations 45 (1919 ed.), Article 292. A year later, the Commissioner permitted the deduction of expenses of meals and lodging, but only to the extent that they were incurred while "away from home" and were "in excess of any expenditures ordinarily required for such purposes when at home." Treasury Regulations 45 (1920 ed.), Article 292; Mim. 2688, 4 Cum. Bull. 209 (1921).

After one year, the Commissioner recognized that the new rule, while logically sound, provided "too cumbersome a procedure".[6] Accordingly, at the suggestion

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24(a)(1); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 24(a)(1); Internal Revenue Code of 1939, Sec. 24(a)(1); Internal Revenue Code of 1954, Sec. 262.

[6] Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 1921, p. 50 (Confidential Committee Print, subsequently released for publication).

of the Treasury Department,[7] Congress enacted Section 214(a)(1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, to provide for the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."[8] See H. Rep. No. 350, 67th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 168, 177); S. Rep. No. 275, 67th Cong., 1st Sess., p. 14 (1939–1 Cum. Bull. (Part 2) 181, 191).

The most obvious import of this new provision was to eliminate the need to divide expenses of food and lodging into deductible "business" and nondeductible "personal" portions. By this change, Congress intentionally allowed a taxpayer who met the requisite of being "away from home" on business to deduct a part of his personal or living expenses. But Congress at the same time retained in Section 215(a) of the same Act, 42 Stat. 227, the general prohibition against deducting such expenses. Thus, Congress could hardly have intended that every man who travels in any way

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[7] *Id.* at 50, 234–235.

[8] Until 1962 identical language allowing the deduction of traveling expenses incurred while away from home was in subsequent Internal Revenue statutes allowing the deduction of ordinary and necessary business expenses (see note 4, *supra*). Section 4(b), Revenue Act of 1962, 76 Stat. 960, amended Section 162(a)(2) of the 1954 Code by striking "(including the entire amount expended for meals and lodgings)" and inserting in lieu thereof "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)". The amendment does not affect the issue of the present case.

in connection with his business be allowed to deduct all expenses incurred while traveling. For example, Congress clearly intended,[9] and this Court has recognized, that the new Act did not give commuters a deduction for the cost of lunch. For, the predecessor of Section 162(a)(2) was "to be contrasted with" the predecessor of Section 262 and, "in light of the interpretation given [the former] * * * [by] Treasury Regulations", the commuter's expenses are not deductible. *Commissioner* v. *Flowers,* 326 U.S. 465, 469–470.

Nor is it likely that Congress intended to allow a taxpayer who travels during the business day and who, like the commuter, returns home in the evening to deduct his meal expenses simply because he traveled a greater distance or a longer time than the commuter. As the Ninth Circuit observed in *James* v. *United States,* 308 F. 2d 204, 206–207:

> Congress freed from taxation income spent on personal living expenses while on business trips. This discriminates against taxpayers whose business does not require travel, and who therefore pay tax upon all of the income which they devote to their personal living expenses. The discrimination may be substantial.
>
> It is not surprising, therefore, that Congress did not allow the deduction of this total amalgam of personal living expense and business expense in every situation involving business

[9] See statement of Dr. T. S. Adams, note 6 *supra* at 234.

> travel. The total cost of meals and lodging was made deductible only when the travel is also "away from home." * * *

For these reasons, Congress must have intended that the phrase "away from home" would limit those trips on which expenses for food would be treated as deductible "living" expenses.[10] It is improbable indeed that the windfall of deducting the "living" expense portion of meals purchased while on a business trip was intended generally to apply except in the case of a taxpayer who incurs substantially increased or duplicated living costs in the pursuit of a trade or a business. Congress, rather, must have contemplated that the deduction would obtain only when business travel would normally result in "living" expenses significantly greater than usual.

Increases or duplication in living costs are most likely to occur—and in a substantial amount—when a traveler is away long enough to require sleep or rest so that the cost of his meals is coupled with a lodging expense. The ordinary taxpayer is not likely to incur a significant enlargement of his expenses unless he finds it necessary to engage lodging. Virtually every person must maintain and pay for a personal residence, whether or not he sleeps there on a given night. But, a multitude of businessmen must on any given day purchase one or more meals, even though, except for commuting, they travel not at all; and when

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[10] Any other conclusion would render the phrase wholly redundant—certainly any "travel" takes the traveler "away from" his home.

they do so, their family food bill is decreased at least in part. Finally, the statute links "meals and lodging" in the conjunctive—thus suggesting that some meaningful relationship between the two was intended. *Commissioner* v. *Bagley*, 374 F. 2d at 207.

II. SINCE 1940 THE COMMISSIONER HAS CONSISTENTLY INTERPRETED THE STATUTE AS ALLOWING A DEDUCTION FOR THE COST OF MEALS ONLY WHEN THE TRIP REQUIRED SLEEP OR REST; CONGRESS, WHICH WAS AWARE OF THIS INTERPRETATION WHEN IT ENACTED THE 1954 CODE, THEREBY APPROVED IT

The Commissioner's administrative interpretation was first published in 1940.[11] I.T. 3395, 1940-2 Cum. Bull. 64, ruled that locomotive engineers and trainmen

[11] The only ruling published before 1940 that ~~dealt with the~~ arguably dealt with the expenses of meals and lodging while ~~traveling~~ was I.T. 1380, I-2 Cum. Bull. 88 (1922), which ruled:

> Field officers of the Bureau of Internal Revenue may deduct the amounts expended by them for meals and lodging for such days as they receive per diem allowance. The amount of the allowance should be included in gross income. Office deputies or field officers having posts of duty and maintaining homes elsewhere may not deduct amounts expended for commuter's fares in traveling between such points, or for meals and lodging while at post of duty. Amounts so expended are personal expenses.

Per diem allowances have been paid to Bureau personnel for travel not requiring a lodging expense. However, in response to an inquiry of the Assistant Attorney General in charge of the Tax Division, made in the course of briefing this case, the Chief Counsel of the Internal Revenue Service advised that the Service's position is that I.T. 1380 does not allow a deduction for meal expenses incurred on trips that do not require sleep or rest, even if a partial per diem is paid, and that I.T. 1380 will be clarified to eliminate any ambiguity in this respect.

who were required to obtain lodging for rest prior to the return portion of their trips could deduct the costs of their meals and lodging incurred on such trips.

Prior to that time the issue was apparently not litigated. In litigation thereafter the Commissioner consistently contended that the costs of meals purchased on one-day trips not requiring sleep or rest could not be deducted, and the courts consistently sustained this position.[12] Numerous rulings expressed the same view.[13] In 1946, the sleep-or-rest rule was prescribed in the publication, Your Federal Income Tax,[14]

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[12] See *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), affirming a Tax Court decision (P–H Memo T.C., par. 51,058), certiorari denied, 343 U.S. 926; *Mortrud* v. *Commissioner*, 44 T.C. 208; *Armstrong* v. *Commissioner*, 43 T.C. 733; *Smith* v. *Commissioner*, 33 T.C. 861; *Winn* v. *Commissioner*, 32 T.C. 220, 225; *Herrin* v. *Commissioner*, 28 T.C. 1303; *Osteen* v. *Commissioner*, 14 T.C. 1261; *Drill* v. *Commissioner*, 8 T.C. 902; *Cummings* v. *Commissioner*, P–H Memo T.C., par. 61,330; *Fogle* v. *Commissioner*, P–H Memo T.C., par. 59,214; *Flaherty* v. *Commissioner*, P–H Memo T.C., par. 52,195; *Fairley* v. *Commissioner*, P–H Memo T.C., par. 48,144; *Blatt* v. *Commissioner*, P–H Memo T.C., par. 47,020; *Hataway* v. *Commissioner*, P–H Memo T.C., par. 44,369.

[13] I.T. 3395, 1940–2 Cum. Bull. 64; Rev. Rul. 190, 1953–2 Cum. Bull. 303, 305; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75, 77–81; Rev. Rul. 55–109, 1955–1 Cum. Bull. 261, 262; Rev. Rul. 56–508, 1956–2 Cum. Bull. 126; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 61–67, 1961–1 Cum. Bull. 25; Rev. Rul. 61–221, 1961–2 Cum. Bull. 34; Rev. Rul. 63–82, 1963–1 Cum. Bull. 33; Rev. Rul. 63–239, 1963–2 Cum. Bull. 87.

[14] "Your Federal Income Tax" is a booklet issued annually by the Treasury Department to help explain the income tax laws to individual taxpayers to enable them to fill out their returns correctly. Since the 1946 edition, that publication has stated—usually with examples given—that a taxpayer may not deduct the cost of meals incurred on business trips unless he

and in 1948 in the instructions accompanying the income tax return.[15]

In the review of the tax laws that resulted in enactment of the 1954 Code, Congress at three separate points considered the Commissioner's "overnight" rule. First, Congress was presented with a taxpayer plea for a change in the rule that disallowed deductions for the cost of meals purchased on one day trips. 1 House Hearings on General Revenue Revisions (1953), 83d Cong., 1st Sess., 214–219; see also 1 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., 8,482; 4 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., 2396. But no such general change was made.

Congress retained in Section 162(a)(2) the precise language that in 1921 was applied to meals and lodging—that such costs be deductible only when incurred "while away from home". A like formulation was used in Section 62(2)(B) in defining adjusted gross income.

Congress did draft two limited exceptions to the Commissioner's interpretation, and in each instance showed its understanding and suggested its approval

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was away from home overnight or had to sleep or rest. *E.g.*, see the 1946 Edition, pp. 89–90; the 1954 Edition, p. 133; the 1955 Edition, p. 16; the 1959 Edition, pp. 42, 43; the 1960 Edition, pp. 50, 51; the 1961 Edition, pp. 49, 50; the 1963 Edition, pp. 48, 49; the 1964 Edition, pp. 49, 50; the 1965 Edition, pp. 37, 38; and the 1967 Edition, pp. 42, 43.

[15] The reference to the "overnight" rule was set out on page 6 of the instruction pamphlets for Form 1040 for the years 1948 through 1960; on page 4 of the instructions for 1961 through 1963; and on page 7 of the instructions for 1964, 1965, and 1966.

of the Commissioner's view of the statutory language.

One exception dealt with meal allowances that States give their police officers. Thus, Congress enacted Section 120 of the 1954 Code, which allowed the patrolmen to exclude such allowances from income, up to $5 per day. The exclusion in no way turned on whether an officer was "away from home." But, in discussing officers who spent more than $5 for meals on a given day, both the House and Senate Reports stated that the officers could deduct expenses over the $5 limit "for meals while away from home *overnight*"—referring thereby to the Commissioner's interpretation of the predecessor of Section 162(a)(2). H. Rep. No. 1337, 83d Cong., 2d Sess., A39–A40; S. Rep. No. 1622, 83d Cong., 2d Sess., 191. [Emphasis supplied.]

The other congressional recognition of the Commissioner's interpretation occurred in the consideration of transportation expenses. The Commissioner had recognized such costs to be "necessary" business expenses in 1919, see Treasury Regulations 45 (1919 ed.), Article 292, when there was no statutory language dealing with "travel" expenses as such. An apparent legislative oversight in 1944 had made it impossible for employees who took the standard deduction to eliminate from their taxable incomes business expenses, including amounts spent on transportation, incurred in the course of their duties unless they were reimbursed by their employer, or the costs were incurred in "travel away from home." Internal Revenue Code of 1939, Section 22(n) as added by Section 8(a) of the Individual Income Tax Act of 1944, c.

210, 58 Stat. 231. Employees using the standard deduction who were not reimbursed for transportation costs incurred on daily trips tried to deduct them as "traveling" expenses in determining adjusted gross income on which the standard deduction was computed. But the Commissioner in applying his sleep-or-rest rule disallowed any such deductions based on one day trips.[16] In recommending Section 62(2)(C) of the 1954 Code, which allows the deduction of employee transportation expenses in computing adjusted gross income, the Senate Finance Committee commented (S. Rep. No. 1622, *supra* at 9) as follows:

> At present, business transportation expenses can be deducted by an employee in arriving at

[16] In litigated cases, courts anomalously allowed transportation expense deductions incurred on one day trips, while they at the same time denied deductions for the cost of meals on the same trips on the ground that the travel was not "away from home." See, *e.g.*, *Winn* v. *Commissioner*, 32 T.C. 220, 224–225 (allowing transportation expense deductions but disallowing meal expense deductions on the same trips); *Summerour* v. *Allen*, 99 F. Supp. 318 (M.D. Ga.) (meal expense deductions disallowed; transportation expense would have been allowed if amount spent away from home county had been proved); *Podems* v. *Commissioner*, 24 T.C. 21, 23.

The First Circuit, in *Commissioner* v. *Bagley*, *supra*, recognized that the case in which it had allowed a deduction of transportation expenses, *Chandler* v. *Commissioner*, 226 F. 2d 467 (C.A. 1), "was an instance of a hard case making bad law. * * * [W]e must conclude that the decision in *Chandler* is incorrect as a guide to the construction of Section 162(a)(2)." 374 F. 2d at 208.

> adjusted gross income only if they are reimbursed by the employer or if they are incurred while he was *away from home overnight.* * * *
>
> Because these expenses, when incurred, usually are substantial, it appears desirable to treat employees in this respect like self-employed persons. For this reason both the House and your committee's bill permits employees to deduct business transportation expenses in arriving at adjusted gross income even though the expenses are not incurred in travel *away from home* or not reimbursed by the employer. * * * [Emphasis supplied.]

See also S. Rep. No. 1622, *supra,* at 169; H. Rep. No. 1337, *supra,* at 9, A19.

It is well established that Congressional review and re-enactment of a tax statute after being informed of the Commissioner's interpretation provides persuasive evidence of tacit Congressional approval. See *e.g., Commissioner* v. *Bilder,* 369 U.S. 499, 502–505; *Commissioner* v. *Lester,* 336 U.S. 299, 301–303; *White* v. *Winchester Club,* 315 U.S. 32, 41; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479.

III. THE DECISIONS OF THE SIXTH AND EIGHTH CIRCUITS REJECTING THE COMMISSIONER'S LONG-STANDING INTERPRETATION OFFER NO ALTERNATIVE RULE AND ALLOW THE DEDUCTION OF MEAL EXPENSES BY THOSE IN THE SAME POSITION AS THE COMMUTER AND INTRA-CITY AND ITINERANT TRAVELER

Between 1944 and 1962 there were more than a dozen cases in which the taxpayer claimed a deduc-

tion for the cost of meals eaten on trips which did not require sleep or rest. The trial courts uniformly refused to allow the deduction.[17]

Only one such case was taken to a court of appeals. In *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926, the First Circuit sustained the disallowance of such meal expenses incurred by a taxpayer who traveled daily within the greater Boston area, because his "situation resembles that of a commuter when he is in the Boston area." 193 F. 2d at 585.

The only case that cast doubt on the Commissioner's sleep-or-rest rule during that period was *Williams* v. *Patterson,* 286 F. 2d 333 (C.A. 5). The rule was only tangentially involved. The issue was whether a railroad conductor who claimed a deduction for the costs of meals, lodging and tips during a six-hour layover had been required to stop for rest by his employer. Accord, *Commissioner* v. *Bagley,* 374 F. 2d at 205 n. 4. The court nonetheless asserted that the Commissioner's rule was a "gloss * * * dreamed up by the Department." But, in allowing a deduction of the cost of meals and lodging the court concluded with an observation which, in essence, restated the 1940 ruling, I.T. 3395 (286 F. 2d at 340):

> If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and to obtain sleep or rest in order to meet the exigencies of his employment or the business demands of his employment, his expenditures

[17] See cases cited in footnote 12, *supra.*

(including incidental expenses, such as tips) for the purpose of obtaining sleep or rest are deductible traveling expenses under Section 162(a)(2) of the 1954 Code.

Hanson v. *Commissioner,* 298 F. 2d 391 (C.A. 8), was the first appellate decision that rejected the Commissioner's sleep or rest rule where meals, but not lodging, were purchased. Hanson, a construction contractor, claimed travel expense deductions for the cost of his meals on daily trips to out-of-town job sites. Reversing the Tax Court, which had specifically applied the sleep-or-rest rule in disallowing the deduction, 35 T.C. 413, the Eighth Circuit thought illogical the proposition that a taxpayer's meals could not be deducted on a trip where he leaves in the morning but returns home the same evening, even though the same meals could have been deducted if a second day were added to the trip (298 F. 2d at 396). In response to the Commissioner's argument that Hanson would receive a "grossly unfair advantage" over other taxpayers who, because of their jobs, must eat their meals away from their residence, the court said only that such a result was the "legislative mandate" (*ibid.*). The court observed that all cases in this area "must be decided according to their own sets of facts" and concluded that every time Hanson traveled on business "away from the area of Washington, Iowa," he was "away from home" for tax purposes and his meal expenses consequently were deductible (*id.* at 397).

The Commissioner announced that he would not follow the *Hanson* decision. Rev. Rul. 63–239, 1963–2

Cum. Bull. 87. Then the present case was brought and tried. When the case came before the Sixth Circuit on the government's appeal, that court regarded *Hanson* v. *Commissioner, supra,* as the "closest appellate case in point" (R. 72). The Sixth Circuit criticized the Commissioner's sleep-or-rest rule as bearing "no rational relation to the business necessity of the meal expense" and as a "time element" which is hardly relevant to the question in "an era of supersonic travel" (*id.* at 89). The appellate court allowed respondent a deduction for the cost of his breakfast and lunch on daily business trips, stating (R. 73): "While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary." The court offered no articulation of the rule "adopted by the Appellate Courts" other than that the Commissioner was wrong. (R. fol. 72–73.) Presumably, the Sixth Circuit, like the Eighth, would have each case turn on the trier of fact's opinion of whether a particular taxpayer was "away from home" on a particular day.

The Sixth Circuit also drew upon (R. fol. 72) the decision of the Tax Court in *Bagley* v. *Commissioner,* 46 T.C. 176, which had been rendered subsequent to the trial of the present case. There, the Tax Court, relying on *Hanson,* discarded its prior view that the sleep or rest rule was a valid exercise of the Commissioner's interpretative authority. Bagley, a consulting engineer, claimed as a deduction the cost of three meals a day he purchased on daily round trips of 140 to 150 miles. In a reviewed decision, the Tax Court allowed the de-

duction. Conceding that the sleep or rest rule provided "simplicity and certainty," the majority concluded (*id.* at 183):

> We will no longer follow the "overnight" rule as an absolute guide in every situation. There is merit in the "hour-distance" test and other tests when applied to exceptional factual patterns. Consequently, each such case will be decided according to its own facts.

Although several concurring judges strongly urged that the basis of the court's holding be clarified, the court made no attempt to state the standards that would govern the weighing of facts in future cases.

In reversing the Tax Court decision in *Bagley*, the First Circuit, 374 F. 2d 204, pointedly criticized the opinions of the Eighth Circuit in *Hanson* and the Sixth Circuit in this case. Responding to the suggestion of the Sixth Circuit (R. fol. 73) "that [creating a workable standard for meal expense deductions] lies with Congress and not with the judiciary," the First Circuit observed that "the Commissioner's rule has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself" (374 F. 2d at 206).

In rejecting the long-standing effort by the Commissioner to translate the statutory concept into a rule that reflects a reasonable accommodation of the Congressional policies embodied in Sections 162(a)(2) and 262, the Eighth and Sixth Circuits and the Tax Court have launched taxpayer and Commissioner alike on a sea of uncertainty. As observed by the concurring

opinions in *Bagley* v. *Commissioner*, 46 T.C. 176, the majority opinion, in adopting a vague *ad hoc* meaning for "while away from home," would tend to "foster litigation by casting a cloud over such cases as *Osteen, Herrin,* and now *Mortrud*" (p. 188); further, "it is not clear what rule is being substituted for [the sleep-or-rest rule, thus] * * *. * * * compelling people to engage in further litigation" (p. 189). See also *Commissioner* v. *Bagley*, 374 F. 2d at 205, 207.

Taxpayers and the Commissioner are simply directed to consider all the facts of each case with no hint as to how to draw the boundaries of relevance. See *Bagley* v. *Commissioner*, 46 T.C., at 183; *Hanson* v. *Commissioner*, 298 F. 2d at 397. Especially where, as here, the issue involves large number of taxpayers and almost infinitely varied factual patterns, what is needed is "a practical administrative approach which will not permit [or require] every meal-purchasing taxpayer to take pot luck in the courts * * *" *Commissioner* v. *Bagley*, 374 F. 2d at 207.[18]

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[18] In 1963, after *Hanson* was decided, the Treasury proposed to Congress that the statute be changed to provide that:

> Food and lodging expenses would be deductible by taxpayers who were temporarily away from their duty areas for periods of at least 16 hours, or a shorter time if they could prove that substantial rest was required on such trip. Itinerants would not be entitled to any food or lodging expense deductions, since they would not have a duty area. [1 House Hearings before Committee on Ways and Means on the President's 1963 Tax Message, 88th Cong., 1st Sess., p. 98.]

The term "home" would have been replaced by "duty area" encompassing (1 Hearings, *supra*, p. 98) "a circular area of 20

IV. THE COMMISSIONER'S LONG-STANDING SLEEP OR REST RULE IS REASONABLE AND PRACTICAL; IT SHOULD BE SUSTAINED

In applying to the meal expenses the statutory distinction between nondeductible "personal" expenses and deductible "business" expenses the starting point should be the tax treatment of commuters, who often cannot, as a practical matter, live next to their work locations, and must therefore each workday eat one or more of their meals away from their residences. They cannot deduct the meal costs under Section 162(a). *E.g., Commissioner* v. *Flowers,* 326 U.S. 465; *Carragan* v. *Commissioner,* 197 F. 2d 246, 249 (C.A. 2); *Steinhort* v. *Commissioner,* 335 F. 2d 496 (C.A. 5). Similarly, taxpayers—like some of respondent's colleagues—who travel on business within their cities of residence cannot deduct the cost of meals eaten on their business travels. *E.g., Amoroso* v. *Commissioner, supra.* Nor can the itinerant traveler—who has no fixed home or principal place of business. E.g., *James* v. *United States, supra; United States* v. *Mathews,* 332 F. 2d 91 (C.A. 9); *Hicks* v. *Commissioner,* 47 T.C. 71; *Duncan* v. *Commissioner,* 17 B.T.A. 1088, 1091–1092, af-

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mile radius with the taxpayer's principal business post as its center". The President stated that the proposals were made because—

> "While the Service's interpretations have generally been sustained in litigation, some courts have adopted contrary rules, so that there is now a lack of certainty and of uniformity regarding some aspects of the travel expense area." President's 1963 Tax Message, p. 98.

The proposal was not reported out of the House Ways and Means Committee.

firmed per curiam, 47 F. 2d 1082 (C.A. 2); *Fisher* v. *Commissioner,* 230 F. 2d 79 (C.A. 7).

Equality of treatment among similarly situated taxpayers is one of the fundamental goals of our system of taxation. *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, 185–186. It is especially important here [19] since taxpayers who are considered to be "away from home" on business are allowed—because of administrative considerations that Congress in 1921 found compelling—to deduct the "entire amount" of their meal expenses, not just the portion attributable to business travel.[20] Thus, such taxpayers receive what amounts to a windfall in the form of a deduction for what is, in part, a personal living expense. There-

[19] Congress in 1958 emphasized that equality of treatment of similarly situated taxpayers is a basic objective in the context of business-related meal expenses. In that year, Congress repealed Section 120 of the 1954 Code, see Technical Amendments Act of 1958, § 3(c), 72 Stat. 1606, which had allowed state police to exclude from their income $5 daily meal allowances, see p. 18, *supra.* The Senate Finance Committee gave as one of its reasons (S. Rep. No. 1983, 85th Cong., 2d Sess., 14):

> * * * this exclusion is inequitable because there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Subsistence expense incurred by taxpayers generally in the performance of services as employees while away from home are deductible * * *.
>
> To bring the tax treatment of subsistence allowances for police officials in line with the treatment of such allowances in the case of other taxpayers, your committee's bill * * * repeals the section of present law providing this $5 exclusion.

[20] The 1962 amendment, see note 8 *supra*, does not change the result of allowing a deduction that in part represents a "living" expense.

fore, the statute should be interpreted, insofar as possible, to eliminate unfair discrimination by limiting the deduction to those taxpayers who, while on business travel, typically incur daily "living" expenses substantially greater than those incurred by persons who may not take a deduction.

But the result below causes unequal treatment of similarly situated taxpayers. Respondent, while away from his residence for approximately 12 hours daily, bought breakfast and lunch, and then returned home in time for his evening meal (R. 46a–47a, 49a–50a, 54a). He, the Sixth Circuit states, should have the deduction. But what of his fellow salesmen whose routes are entirely within their hometowns (R. 37a–38a)? They, like any intra-city traveler, plainly may not deduct the costs of their meals. They, the commuter, respondent and any one day traveler are all in identical economic positions. Nothing in the opinion below explains or justifies giving them differing tax treatment.

The Sixth Circuit thought that "[i]n an era of, supersonic travel" the Commissioner's rule "is hardly relevant" and "bear[s] no rational relation to the business necessity of the meal expense" (R. fol. 72–73). But "business necessity" is not the question here; the need for determining when a taxpayer is "away from" his home cannot so easily be avoided. Modern high speed travel, far from impeaching the Commissioner's interpretation, creates even greater reason to sustain the sleep or rest rule in order to avoid giving more favorable tax treatment to persons such as respondent and the man who takes a one day jet trip between

New York and Chicago [21] than is given a commuter or respondent's fellow salesmen whose routes were entirely within their hometowns. Indeed, the jet traveler is in no different position than the taxpayer who, just as a businessman could do in 1925, takes a one day train trip between New York and Philadelphia. Whether viewed in terms of "business necessity" or the economic impact of their travel, all of these taxpayers are in the same position and all should receive the same tax treatment under Sections 162(a)(2) and 262.

In contrast to such arbitrary discriminations, which the Sixth and Eighth Circuits would allow, the First Circuit in *Bagley* could see (374 F. 2d, p. 207)—

> no justification for allowing salesman Correll two meals, and salesman Amoroso none. Nor would we give Amoroso one and commuter Osteen none.[22] Equally, we see no reason, to

[21] The magnitude of the discriminations that would result from the decision below is demonstrated by the increasing amount of one day business travel by air. In the 12-month period ending March 1964, there were 8,321,839 outbound domestic flight passengers departing the New York area's three major airports, La-Guardia, Newark and Kennedy International. Six million three hundred and ninety-four thousand passengers started their trips in New York. Sixty-three percent of these, or 4,056,000 were traveling for business reasons. Sixteen percent of the 4,056,000 returned to the New York area the same day they departed. New York's Domestic Air Passenger Market, April, 1963, through March 1964, The Port of New York Authority, Aviation Economics Division, May 1965, pp. 7, 11, 17, 55.

[22] Osteen was a railway postal clerk who was denied a business travel expense deduction for lunches on a daily trip to a city 100 miles from his home, and Amoroso was a salesman residing 10 miles away from the city of Boston who was denied deductions for meals purchased while traveling on business

take a frequently referred to hypothetical, why a man who makes a quick trip to Washington, missing neither breakfast nor dinner at home, should be allowed his lunch merely because he is traveling more miles than Amoroso, the salesman who travels locally. The courts in *Hanson* and *Correll* do not discuss this inevitable question. We think, at best, that all they do is to push the dividing line somewhere else, with no avoidance of the ultimate necessity, and difficulty, of drawing it. At worst, they make the drawing of it considerably harder.

The Commissioner's rule, unlike the result below, generally allows the deduction only to persons whose travel expenses significantly exceed those incurred by taxpayers who cannot have the deduction. Where a taxpayer is away from his home city such a period of time that he must sleep or rest, ordinarily he will incur lodging expenses which will essentially duplicate the usually substantial expense of maintaining his permanent residence. It is those taxpayers who are in a significantly different—and substantially more burdened—economic position than the commuter, the intra-city traveler or the itinerant with no fixed abode. Only persons in so different a position should be en-

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within the greater Boston metropolitan area. *Osteen* v. *Commissioner*, 14 T.C. 1261; *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926.

titled to the benefit of the deduction. As stated in *Commissioner* v. *Bagley, supra* at 206:

> the manifest statutory purpose is to permit deductions when business activities require duplication. Lodging away from home may well be all extra expenses. However, even though a meal away from home may be more expensive, presumably it is not all added cost. * * *
>
> * * * * *
>
> We believe that fairness to the greatest number of people * * * [requires acceptance] of the Commissioner's sleep or rest rule.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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No. 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, *Petitioner*,

v.

HOMER O. CORRELL AND DOROTHY CORRELL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF BUREAU OF SALESMEN'S NATIONAL ASSOCIATIONS IN SUPPORT OF RESPONDENTS

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---

AMICUS CURIAE BRIEF OF BUREAU OF SALESMEN'S NATIONAL ASSOCIATIONS IN SUPPORT OF RESPONDENTS

STATEMENT

This *amicus curiae* brief is respectfully filed on behalf of the Bureau of Salesmen's National Associations[1] in support of the respondents in the above

[1] The Bureau of Salesmen's National Associations is composed of three member organizations, each organization in turn is composed of salesmen who travel for their livelihood.

styled and numbered cause. Consents of the parties, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States, have been obtained and are furnished herewith.

The individual members of the Bureau's member organizations are 15,000 traveling salesmen, engaged in the wholesale sale of garments and related accessories to retail commercial establishments. These establishments are located in each of the 50 states of the United States and Canada. Members of the organizations, in selling to these establishments, spend much of their time traveling, both on overnight and one-day trips. Because of their frequent travel, the salesmen will find any decision by this Court concerning the deductibility of the costs of meals incurred on one-day business trips has great impact on their lives and the manner in which they do business.

INTRODUCTION

At the outset, this amicus notes its full agreement with the Government in framing the issue in terms of the dichotomy between sections 162 and 262,[2] as follows.

> "Is the deduction allowable because the money was spent in the course of taxpayer's business activities? Or is it not because the cost of food is an ordinary expense of everyday life?"[3]

The fundamental question here is whether the cost of a meal eaten in a restaurant in the course of a one-day business trip is the result of business needs and

[2] All references are to the Internal Revenue Code of 1954 unless otherwise indicated.

[3] Brief for the United States, p. 5.

demands rather than the personal conveniences and necessities of the taxpayer. *Commissioner* v. *Flowers,* 326 U.S. 465 (1945). The language of section 162(a)(2) does not itself resolve this issue. Assistance must be sought in administrative and judicial rules which, by construction of the statutory language, make section 162(a)(2) relevant and meaningful in the manifold situations to which it may apply.

One such rule is provided by the Commissioner's definition of "home" as the taxpayer's principal post of duty. See, Rev. Rul. 63-82, 1963-1 Cum. Bull. 33; G.C.M. 23672, 1943 Cum. Bull. 66. "Home" is generally understood to encompass the metropolitan area where the taxpayer regularly works or mainatins his business headquarters. *Amoroso* v. *Commissioner,* 193 F.2d 583 (1st Cir., 1952) cert. den. 343 U.S. 926 (1952); Rev. Rul. 55-236, 1955-1 Cum. Bull. 274. This expansive definition of "home" elminates from consideration the meal expenses of the commuter and of the taxpayer who makes short trips in and around the metropolitan area of his "home". Amicus does not challenge this extension of the common meaning of "home" as being unfair.

Thus, (to use examples posed by the Petitioner), any taxpayer, on the one hand, who either lives and works in Manhattan but buys lunch on a trip to Newark, or the salesman or doctor who spends part of his working day in Westchester,[4] has not left the New York metropolitan area (his "home" within Rev. Rul. 55-236, *supra*). Therefore, not being in the "travel status" required by section 162(a)(2), he cannot deduct the cost of meals incurred during such a

[4] Brief for the Petitioner, at 6.

day. Any taxpayer, on the other hand, who takes a train to Philadelphia or flies to Chicago is, however, distinguishable from the taxpayer who never leaves his metropolitan area. That he eats one or more meals in a restaurant is no longer a matter of personal predilection. Business demands that he spend some or all of his day in a distant city. Therefore, business requires him to eat one or more meals in a restaurant. That he is able to return to his residence to sleep does not change the basic situation during working hours.

Amicus submits that a rule which determines whether and when a taxpayer is "away from home" must do so in light of the nature and motivation of his expenses: allowing a deduction for business induced expenditures while disallowing one for personal expenditures.[5]

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[5] Usually lunch, or any meal, eaten in the taxpayer's metropolitan area is the result of "personal conveniences and necessities." "Duplication" of expenses has, we submit, little weight in this situation. In *Commissioner* v. *Flowers*, *supra*, taxpayer clearly duplicated both food and lodging expenses, but no deduction was allowed since such duplication was the result of personal choice. Moreover, all meals eaten in a restaurant duplicate to some extent the personal expenses of home preparation. The question here is not whether such costs are duplicated, but why they are duplicated. If motivation is personal, no deduction is allowed; but if the cause is business, the taxing pattern established by the Code permits a deduction.

ARGUMENT

1. THE "OVERNIGHT" RULE, AS AN ADMINISTRATIVE GLOSS ON SECTION 162(a)(2), SHOULD NOT BE THE EXCLUSIVE TEST OF DEDUCTIBILITY OF THE COST OF MEALS; OTHER TESTS ARE APPROPRIATE

The "overnight" (or "substantial-sleep-or-rest")[6] rule was devised to assist the Internal Revenue Service in applying section 162(a)(2). Its purpose was and is to distinguish business from personal expenses by making an objective, though somewhat arbitrary, determination of when a taxpayer is "away from home".[7]

The "overnight" rule is properly applicable in the case of certain transportation workers, e.g., a railroad employee.[8] *Fred M. Osteen,* 14 T.C. 1261 (1950); *Sam J. Herrin,* 28 T.C. 1303 (1957). In this context, the rule's function is to deny the special "travel status" of section 162(a)(2) to persons whose work is in transportation, thus keeping meals an essentially personal and non-deductible expense. However, while the "overnight" rule is suited to the situation of certain transportation workers, we contend that it should not be the exclusive test of the deductibility of meals under section 162(a)(2). When a person travels in

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[6] Rev. Rul. 54-497, 1954-2 Cum. Bull. 75.

[7] *Williams* v. *Patterson,* 286 F. 2d 333 (5th Cir., 1961).

[8] "Home" for such persons has been defined as the railroad (or truck) terminal where the employee starts and finishes each day's work. I.T. 3395, 1940-2 Cum. Bull. 64. If the employee is on a "turn-around" run (comparable to a one-day business trip), his daily routine takes him a substantial distance "away from home" and back again. He may eat at least one meal *en route.* However, assuming a normal working day, the fact that his work is mobile rather than stationary is an insufficient basis to allow him to deduct the cost of meals under section 162(a)(2). *Cf., Jerome Mortrud,* 44 T.C. 208 (1965); *Fred G. Armstrong,* 43 T.C. 733 (1965).

order to transact business at a distant point, the "overnight" rule does not rationally serve the purpose for which it was designed: to indicate whether the cost of a meal was incurred as a personal or business expense. *United States* v. *Morelan*, 356 F. 2d 199 (8th Cir., 1966); *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir., 1962).

Rather, arbitrary and unreasoned application of the "overnight" rule to all persons, however situated, often produces unjust results. Thus, a salesman with widely separated territories is burdened by application of the "overnight" rule. He may drive to one area (away from his principal post of duty) to service it. The cost of meals will be deductible if he chooses, or can afford to stay overnight. However, if he extends his working day to return home in order to service his customers in another area the following day, the deduction is denied. The "overnight" rule penalizes the taxpayer who has a tighter schedule, who works a longer day, or who can least afford the cost of lodging. But, in this context, the rule does not rationally indicate under most modern-day travel conditions whether the meal or meals was a business or personal expense.

II. A TAXPAYER SHOULD BE ENTITLED TO DEDUCT THE COST OF MEALS INCURRED IN PURSUIT OF HIS TRADE OR BUSINESS, REGARDLESS OF WHETHER OR NOT HE IS AWAY OVERNIGHT, IN ANY ONE OF THE FOLLOWING SITUATIONS.

We believe that other tests, in addition to the "overnight" rule are appropriate to determine the deductibility of meals under section 162(a)(2)—tests which, we suggest, will operate more fairly in light of the realities of modern-day business travel, and which, we also suggest, are not any more difficult or inconvenient to administer than the "overnight" rule. Thus, we believe that whether the taxpayer is "away from home"

may be objectively determined by benchmarks other than, and in addition to, the "overnight" rule. For example, both hours spent and miles traveled away from the taxpayer's principal post of duty are equally valid indicia under section162(a)(2). While no simple mathematical formula is proposed (or can be devised), and while each case must be decided on its own facts and circumstances, the elements of a general rule, capable of easy administration, are hereby proposed.

A. Where the Taxpayer Travels a Substantial Distance "Away From Home"

In some cases the taxpayer will be away from his principal post of duty a relatively short period of time.[9] But in this age of jet travel[10] great distances

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[9] The fact that taxpayer does not duplicate lodging expenses on such a trip is not relevant in the present case. Yet Petitioner argues at p. 7 of his brief (and repeats the argument at p. 30) that duplication of lodging expenses is a necessary precondition to a deduction for meals. Why this should be so is never stated. Duplication of meal expenses occurs at any time the taxpayer has incurred the costs of food preparation in his residence, but eats elsewhere. Such duplication has no necessary relation to the additional costs incurred if and when the taxpayer also sleeps in a hotel or motel. See, also, footnote 5 on p. 41, *supra*. Moreover, whether duplication is anything more than an illusory rationalization for the operation of section 162(a)(2) is open to question. See, *William A. Bagley*, 46 T.C. 176 (1966), rev'd *sub nom. Commissioner* v. *Bagley*, 374 F. 2d 204 (1st Cir., 1967), where the Internal Revenue Service conceded that taxpayer was entitled to deduct the cost of meals incurred on overnight trips despite the fact that taxpayer always ate *all* his meals in a restaurant. In this situation no duplication of costs was possible.

[10] A person is often served a "complimentary" meal while traveling by plane; yet the Commissioner apparently does not require reduction of the amount deductible as a transportation expense to account for such meals. This heightens the discrimination produced by the "overnight" rule: a person who travels by car or train is allowed no such tax benefit.

may be traversed in a single day without need of sleep or rest. In *Gerald G. Smith,* 25 T.C.M. 1266 (1966), taxpayer's home was in the Los Angeles area. He flew to San Francisco to transact business, returning to Los Angeles by mid-afternoon of the same day. The distance traveled (some 400 miles) was substantial. Such distance clearly indicates that the taxpayer was "away from home" as that phrase is commonly and ordinarily understood.

To say that the taxpayer is not "away from home" when he travels substantial distances detaches the Internal Revenue Code from reality, creating unnecessary and confusing legal fictions. If anything, the "overnight" rule applied in this context makes the Code more difficult for the ordinary taxpayer to understand in a collection system which ultimately depends on self-administration of the law.

B. Where the Taxpayer Spends Substantial Time "Away From Home" During the Day as to Necessitate Purchasing a Second Meal

In other cases the taxpayer travels relatively short distances away from his principal post of duty (75 or 100 miles), but his day is a long one. Here one indication that the taxpayer is "away from home" within section 162(a)(2) is that his trade or business requires that he eat more than one meal outside the general area of his home. In the present case, the exigencies of the taxpayer's business required him to work more than 12 hours a day, having two meals (breakfast and lunch) on the road. In *William A. Bagley,* 46 T.C. 176 (1966), rev'd *sub nom. Commissioner* v. *Bagley,* 374 F. 2d 204 (1st Cir., 1967), taxpayer returned home after 10 p.m., often eating three meals at his away-from-home loca-

tion. See, also, *Hanson* v. *Commissioner,* 298 F. 2d 391 (8th Cir., 1962).

Where the taxpayer travels some distance from his principal post of duty, and his working day is such that he must eat either breakfast or dinner before returning, we believe that the time spent in "travel status" is sufficiently substantial to allow him to deduct the cost of his meals under section 162(a)(2).

III. THE TRAVEL AND ENTERTAINMENT RECORD-KEEPING REQUIREMENT OF SECTION 274 PROVIDES THE NECESSARY ADMINISTRATIVE SAFEGUARDS TO PERMIT ADOPTION OF OTHER TESTS FOR DEDUCTIBILITY OF MEALS.

While adding nothing of substance to § 162(a)(2),[11] the purpose of the 1962 Act record-keeping requirements set forth in section 274 and specifically section 274(d) is, however, to make the travel and entertainment rules capable of easy administration.

Section 274(d) provides:

> "(d) SUBSTANTIATION REQUIRED.—No deduction shall be allowed—
>
> (1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),
>
> (2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity, or
>
> (3) for any expense for gifts.
>
> unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his

[11] Section 274(d) provides that the taxpayer must record the amount of expense, time and place where incurred and business purpose in order to be entitled to a deduction under section 162.

> own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility, or receiving the gift. The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations."[12] [Emphasis supplied.]

With these detailed records now required indicating the time, place, amount and business circumstances in which meals are eaten, both the taxpayer and the Commissioner's agents will be able to determine readily

---

[12] The Treasury Regulations state that, "*In general.* No. deduction shall be allowed for any expenditure with respect to—(1) Traveling away from home (including meals and lodging) deductible under section 162 or 212, * * * unless the taxpayer substantiates such expenditure . . ." Treas. Regs. § 1.274-5(b)(2) provides with respect to travel expenditures, specifically:

"(2) *Travel.* The elements to be proved with respect to an expenditure for travel are—

(i) *Amount.* Amount of each separate expenditure for traveling away from home, such as cost of transportation or lodging, except that the daily cost of the traveler's own breakfast, lunch, and dinner and of expenditures incidental to such travel may be aggregated, if set forth in reasonable categories, such as for meals, for gasoline and oil, and for taxi fares;

(ii) *Time.* Dates of departure and return for each trip away from home, and number of days away from home spent on business;

(iii) *Place.* Destinations or locality of travel, described by name of city or town or other similar designation; and

(iv) *Business purpose.* Business reason for travel or nature of the business benefit derived or expected to be derived as a result of travel."

from analysis of the diary or other contemporaneous records whether the taxpayer traveled sufficient distance or spent sufficient time away from his principal post of duty to be entitled to a deduction under section 162(a)(2). In 1963, the Internal Revenue Service expressed its willingness to undertake such detailed analysis in the interest "of certainty and of uniformity regarding some aspects of the travel expense area." [13] We believe the Petitioner will agree that this detailed record-keeping will afford sufficient administrative safeguards if the overnight rule is expanded as we suggest.

CONCLUSION

The Bureau of Salesmen's National Associations, as *amicus curiae,* recommends to the Court the adoption of the following rule as a guide to the deduction of the cost of meals under section 162(a)(2):

> A taxpayer is entitled to deduct the cost of meals incurred in pursuit of his trade or business:
>
> **(1) If He Travels A Substantial Distance;**
>
> **(2) Spends A Substantial Time Away From His Principal Post of Duty; or**
>
> **(3) Incurs Lodging Expense;**
>
> provided that, as required by § 274, he maintains adequate, contemporaneously prepared records indicating the requisite facts to support such deduction.

In summary, when a taxpayer either travels a substantial distance or spends a substantial time "away

---

[13] See, President's 1963 Tax Message, in Hearings before the House Ways and Means Committee, 88th Cong., 1st Sess. at 98-99 (1963).

from home", then, we submit, the cost of meals is a business-induced expense. Under those circumstances, he does not eat in a restaurant as a matter of personal convenience or necessity. Rather, the cause of the additional expenses is directly related to the pursuit of the taxpayer's business. (Contrary to the government's views, this situation is completely distinguishable from the commuter or the taxpayer who never leaves the general metropolitan area of his "home".) We submit that such a taxpayer's expenditures should be deductible under section 162(a)(2).

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1967

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UNITED STATES OF AMERICA, *Petitioner*,

v.

HOMER O. CORRELL and DOROTHY CORRELL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF MANUFACTURING CHEMISTS' ASSOCIATION, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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BRIEF OF MANUFACTURING CHEMISTS' ASSOCIATION, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

The Manufacturing Chemists' Association, Inc., appearing as amicus curiae, files this brief in support of respondents. This brief is filed pursuant to Rule 42 of the RULES of the Supreme Court of the United States. Both counsel for petitioner and counsel for

respondents have stated that the respective parties consent to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Manufacturing Chemists' Association is incorporated under the laws of the State of New York. It is a nonprofit membership corporation (New York) with 184 U. S. member corporations, large and small, which account for more than 90 percent of the productive capacity of the chemical industry in this country. Its by-laws require that eligible members shall be manufacturers of chemicals who sell to others a substantial portion of the chemicals they produce. The industry carries on its activities throughout the United States and in foreign countries.

All members of the Association are vitally interested in the question involved herein, namely:

> "Whether amounts expended for breakfast and lunch while on the road constitute deductible 'traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business' within the meaning of section 162(a)(2) of the 1954 Code."

The question presented in this case deeply concerns the chemical industry for the Court's answer will have important consequences to its member companies and employees with respect to travel of its employees. Many thousands of employees of member companies travel on their employers' business during a calendar year and it is to be anticipated that the number will progressively increase. The membership of the Association favors the result of the decision of the Sixth Circuit Court of Appeals, and is disturbed as to the consequences of a reversal of this decision.

ARGUMENT

The Association endorses the arguments set forth in the brief of the respondents. There is no doubt that the taxpayer was, in the language of section 162 (a)(2) of the Internal Revenue Code of 1954, "away from home in the pursuit of a trade or business," and pursuant to such section is entitled for taxable years involved in this case to deduct the entire amount expended for his meals.

The respondents' brief adequately analyzes the Court decisions which have rejected the government's interpretation of the "while away from home" test. There is no need again to review these decisions of *United States* v. *Morelan,* 356 Fed. 2d 199 (1966); *Hanson* v. *Commissioner,* 298 Fed. 2d 391 (1962); *Chandler* v. *Commissioner,* 226 Fed. 2d 467 (1955); *Williams* v. *Patterson,* 286 Fed. 2d 333 (1961); *Scott* v. *Kelm,* 110 Fed. Supp. 819 (1953); *Amoroso* v. *Commissioner,* 193 Fed. 2d 583 (1952), and *Kenneth Waters* v. *Commissioner,* 12 T.C. 414 (1949).

The brief for the petitioner emphasizes that the Internal Revenue Service has taken a position over a substantial period of time that in order to qualify as being "away from home" the taxpayer must remain away overnight. However, it is clear that an interpretation of the Internal Revenue Service with regard to an issue is always subject to review by the courts. In instances too numerous for citation, this Court has held invalid rulings and regulations of the Commissioner when it believed them to be an improper interpretation of the law. As recently as May 5, 1967, this Court held in *Northeastern Pennsylvania National Bank and Trust Company, Petitioner* v. *United States,* No. 637

(October Term, 1966), that the rule laid down by the Treasury Department in section 20.2056(b)-5(c) of its regulations defining a "specific portion" of an interest in property for purposes of the marital deduction provisions of the estate tax was invalid since the rule was too restrictive in light of the intent of Congress. For other cases to this effect, see: *Commissioner* v. *Acker,* 361 U.S. 87, 93 (1959); *United States* v. *Calamaro,* 354 U.S. 351, 358 (1957); *Haggar Co.* v. *Helvering,* 308 U.S. 389, 398 (1940); *Koshland* v. *Helvering,* 298 U.S. 441, 466 (1936).

The petitioner also claims that since Congress has considered "at three separate points the Commissioner's overnight rule" it is persuasive evidence of tacit Congressional approval. The reenactment by the Congress of section 162(a)(2) without change does not mean that the Congress approved the government's interpretation as proper under present law. See *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 432 (1955); *Helvering* v. *Reynolds,* 313 U.S. 428, 432 (1941); and *Massachusetts Trustees* v. *U. S.,* 377 U.S. 235, 241 (1964). The fact that Congress adopted section 120 and section 62(2)(c) to take care of certain specific problems does not indicate that the Congress focused on the basic question. Furthermore, the taxpayer whose testimony is set forth in 1 House Hearings on General Revisions (1953) Cong. 1st Sess., 214-219 (referred to at page 17 of Government's brief), stated that there was no basis for the Internal Revenue Service position, and that in litigation the businessman would more than likely prevail. Thus, his testimony pointed out to the Congress that the correct interpretation of the law is contrary to the Internal Revenue Service's position. It might logically be concluded that Congress decided to leave this issue to the Courts.

As a matter of fact, even prior to the enactment of the 1954 Code the U. S. Tax Court had, in connection with the deductibility of travel expenses under section 22(n)(2) relating to expenses of travel while away from home, expressly rejected the overnight rule in *Kenneth Waters,* 12 T.C. 414 (1949). On page 417 the Court stated:

> There is no connotation that the trip must be an overnight one, nor do we think Congress intended such a connotation.

This same conclusion as to travel expenses was reached before 1954 in *Scott* v. *Kelm,* 110 F. Supp. 18 (1953).

Although the Commissioner has for many years applied the "overnight" rule, the Court of Appeals for the Sixth Circuit correctly points out that it was not until 1958 that the Treasury Department referred to it in its regulations. On August 22, 1958, section 1.162-17 was promulgated by Treasury Decision 6306. The purpose of this section was to prescribe rules for the reporting and substantiation of traveling and other business expenses on employee income tax returns. This section, therefore, cannot be said to be an interpretative one but only an administrative or procedural regulation designed for guidance to taxpayers in making out tax returns.

On Page 20, petitioner's brief makes a statement to the effect that Congressional review and reenactment of a tax statute after being informed of the Commissioner's interpretation provides persuasive evidence of tacit Congressional approval. The brief then refers to four cases in support of this statement. However, these cases do not seem to be pertinent to the facts in the instant proceeding. In *Commissioner* v. *Bilder,*

369 U.S. 499, 505 (1962) this Court pointed out that the House and Senate Committee Reports in connection with the enactment of the 1954 Code specifically directed themselves to clarifying existing law as to the issue relating to deductions for medical expenses. *Commissioner* v. *Lester*, 366 U.S. 299, 305 (1961), involved the deductibility of payments made to the divorced wife of the taxpayer, and, in holding for the taxpayer, this Court refused to agree with the Commissioner's claimed consistent administrative determination since "there was such a contrariety of opinion among the Courts of Appeal." In *White* v. *Winchester Country Club*, 315 U.S. 32, 29 (1942), relating to taxability of club dues, the Court stressed that the Congress actually changed the law by the Revenue Act of 1941 which change was considered as supporting the validity of the Treasury interpretation. *Harrison* v. *Northern Trust Company*, 317 U.S. 476 (1943) involved a Federal estate tax issue with respect to which the legislative history in the House and Senate Committee Reports clearly and directly indicated the Congressional intent applicable to the proper deduction for bequests to charity.

There is no doubt that equality of treatment is a fundamental goal of our system of taxation as indicated in the petitioner's brief. However, the result below, contrary to the petitioner's statement, does not cause unequal treatment of similarly situated taxpayers. Individuals who travel substantial distances necessitating the expenditure for meals while traveling should all obtain a deduction for those expenditures while away from home as provided in section 162(a)(2). Unequal treatment is accorded those taxpayers if an arbitrary line, such as the overnight rule, is drawn

by the courts. The cases cited previously rejecting the Commissioner's overnight rule adequately and convincingly point out that a two-day versus a one-day rule does not fairly draw that line. Experience by those who travel considerable distances such as a one-day jet trip between New York and Chicago indicates that the expenses for meals significantly exceed the costs of comparable meals by those who remain at their home base. The petitioner is not correct in alleging that the commuter, respondent, and any one-day traveler are all in identical economic positions. It is recognized that each taxpayer's circumstances will have to be considered in applying the test as to whether the taxpayer is away from home. This stems from the intent and coverage of section 162(a)(2). The deductibility of a taxpayer's meals should not be denied him because some judgment has to be exercised in interpreting the provisions of the law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

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versus

HOMER O. CORRELL and
DOROTHY CORRELL, - - - - - Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit.

BRIEF FOR HOMER O. CORRELL AND DOROTHY CORRELL.

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v.

HOMER O. CORRELL AND DOROTHY CORRELL, - - - - - *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR HOMER O. CORRELL AND DOROTHY CORRELL.

PRELIMINARY STATEMENT.

Respondents accept the government's Statement of Opinions Below, Jurisdiction, Questions Presented, Statute Involved and Statement of the Case.

SUMMARY OF ARGUMENT.

Section 162 (a) (2) of the Internal Revenue Code of 1954 permits a taxpayer to deduct the cost of meals while away from home in the pursuit of his business. The respondent, a traveling salesman, ate his breakfast and noon meal in restaurants located in towns some

fifty to sixty-five miles from his home in Fountain City, Tennessee. The respondent would leave home each morning shortly after 4:30 A.M. and return home around 6:00 P.M. in the evening.

The eating of such meals in distant towns was business induced and was directly related to the respondent's business. His employer required him to eat both meals at particular restaurants and these restaurants were also customers of the respondent.

The wording of Section 162 (a) (2) of the Code is not ambiguous and does not require a strained interpretation. The Commissioner's rule that before a taxpayer is away from home he must remain away overnight or for a period requiring sleep or rest is a modification of the statute and beyond the powers granted by Congress.

All courts deciding this issue, except the First Circuit, have refused to adopt the Commissioner's interpretation. The First Circuit's decision is in error in that the Court failed to recognize the important separation of functions of the various branches of our government.

There is a great distinction between traveling salesmen and daily commuters. The facts in this case clearly establish such distinction. A commuter has the option of eating his breakfast and noon meals at home while the demands of business require the traveling salesman to eat in restaurants located in distant towns or cities. Since a commuter's meal is not business induced he is not permitted a deduction for the cost of

meals and the rationale behind such rule is quite reasonable.

The legislative history is very brief and can hardly be said to support the Commissioner's interpretation. Resort to legislative history should be made only when the language of the statute is ambiguous. The Commissioner contends that his ruling is of long-standing but his interpretation has never been made a part of the pertinent regulations. Moreover, the failure of Congress to change the wording of the code section despite many Court decisions repudiating the Commissioner's interpretation and constant urgings by the Commissioner to make certain changes would appear to indicate that Congress approves of the respondents' interpretation.

The overnight rule bears no rational relation to the business necessity of the meal expense and any rule of thumb using a time factor cannot be a valid regulation under the present statute.

ARGUMENT.

I. The Respondent Was Away From Home in the Pursuit of His Trade or Business When He Ate Breakfast and Lunch During the Years in Issue.

Section 162 (a) (2) of the Internal Revenue Code of 1954 provides that a taxpayer may deduct the entire amount expended for meals while away from home in the pursuit of his trade or business. The fact that the respondent was "away from home" when he ate both his morning and noon meals cannot be disputed. During the years in issue, the respondent lived in Fountain

City and on a typical day ate breakfast in Sweetwater, Tennessee, which is some fifty miles from Fountain City, and subsequently ate lunch in Athens, Tennessee, which is approximately sixty-five miles from Fountain City (R. 47a-53a, 58a).

The government has never disputed the fact that the respondent was actively pursuing his trade or business when he ate both his morning and noon meals. In this connection the record shows that the respondent was a salesman for Hale Brothers, Inc., which has as its principal business the distribution of fruits, vegetables, canned goods and frozen foods (R. 25a-26a). In his capacity as a salesman for Hale Brothers, Inc., the respondent had the responsibility to call on customers located throughout a section of east Tennessee, which included the cities of Madisonville, Englewood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette and Jellico (R. 45a). Due to the nature of the business involved, the respondent's employer required him to be in his territory at the beginning of the business day (R. 28a-29a). To do so he had to arise each morning at 4:30 A.M. in order to drive the necessary distance and to arrive in his territory at the required time (R. 28a-29a, 46a, 51a-52a). The respondent was also required to eat breakfast and lunch at a specified customers' restaurant where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 6:00 P.M. (R. 49a, 54a). The respondent does not travel the same route each day but the above correctly reflects the time and distances.

Thus, as shown above, the respondent was "away from home in the pursuit of his trade or business" when he ate both breakfast and lunch. By applying these undisputed facts to the law as stated in Section 162 (a)(2) of the Code, there would appear to be no question concerning the respondent's right to deduct the cost of eating breakfast and lunch and/or to exclude any amounts received as reimbursement for such expenses from his taxable income.

The controversy arises, however, because the Commissioner contends that before a taxpayer is "away from home" he must remain away from home "overnight" or for a "period requiring sleep or rest".

II. The Commissioner's Added Requirement That a Taxpayer Must Remain Away From Home Overnight or For a Period Requiring Sleep or Rest Is an Amendment or Modification of the Statute and Exceeds the Commissioner's Authority to Prescribe Rules and Regulations.

The Commissioner's interpretation that a taxpayer is not away from home unless he remains away overnight or for a period requiring sleep or rest is so obvious a modification of the phrase "while away from home" as to preclude any reasonable argument to the contrary. There is nothing ambiguous about the meaning of the phrase while away from home. While away from home in its plain, ordinary and popular sense means precisely what it says. It means travel while away from one's home. If Congress had intended some other connotation, how simple it would have been for

Congress to have changed or amended the code section to read "while away from home overnight" or "while away from home for a period requiring sleep or rest" if that was the interpretation intended.

The Commissioner attempts to justify his modification of the code section by contending that Congress never intended to grant an alleged windfall to certain taxpayers by permitting them to deduct expenses which would otherwise constitute non-deductible personal living expenses except for the fact that the taxpayers are away from home at the time the expenses are incurred. In the same breath, however, the Commissioner admits that the cost of such meals are deductible but argues that Congress must have contemplated that the deduction would be allowed only when there exists an increase in or a duplication of living expenses. The fallacy in such an argument can be proven by the fact that there can never be a duplication of meal expenses. Unlike lodging expenses, the purchase of meals, either on a one day trip or on an overnight trip, can never result in increasing the cost of meals to a taxpayer since there is a corresponding reduction in the cost of meals at home. Nor will the cost of such meals be greater if a taxpayer stays away overnight rather than returning home at the end of the business day. Thus, under the Commissioner's theory there can be no more justification for deducting the cost of meals while away overnight than for deducting the cost of such meals on a one day trip.

Moreover, why must we assume, as the Commissioner so strongly contends, that Congress did not in-

tend to favor businessmen who travel away from home as opposed to those who travel in their own home town. The granting of such deductions has long been a matter of legislative grace and there are numerous instances where our tax laws favor a certain group of taxpayers. But even assuming, for the purposes of argument, that a group of taxpayers realize a windfall under the statute as written, does this give the Commissioner the power to change the law as written by Congress? Obviously such is not the case.

It seems to be agreed by many that the jet age has helped create the present problem since a taxpayer can now travel great distances and still return home at the end of the business day. While this may or may not be the cause of the problem, the respondent submits that any change in the law, if one be required, to equalize the tax status of a traveling salesman and a daily commuter must be made by Congress and not by the Commissioner of Internal Revenue.

The Commissioner also argues that the overnight or sleep or rest rule must be adopted because, without such a rule, it will be difficult to determine when a taxpayer is "away from home". This argument should be given little weight since many sections of the Internal Revenue Code require that each case be decided on its own particular facts. An excellent example is the much litigated imposition of the accumulated earnings tax penalty under Section 531 *et seq.*, of the Code. The Courts have had little difficulty in applying the while away from home test. In the case of *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C.A. 1st 1952), the Court

held that a salesman who traveled only in the greater Boston metropolitan area was not away from home within the meaning of Section 162 (a)(2) of the Code. The fact it may be difficult to determine each case does not appear to burden the Courts. The Tax Court in the case of *Bagley* v. *Commissioner,* 46 T.C. 176, reversed 374 F. 2d 204 (C.A. 1st 1967), in repudiating the Commissioner's overnight rule, made the following observation:

> "We do not deny that the overnight rule is one of administrative convenience. Indeed it provides simplicity and certainty. But just as most rules of law yield to exceptions, so too must administrative workability yield to logic, reason and justice. Therefore, in line with the general views expressed by the Courts of Appeals in *Williams, Hanson* and *Chandler,* we will no longer follow the overnight rule as an absolute guide in every situation. * * * Consequently, each case will be decided according to its own facts."

While all of the arguments used by the government may or may not be good reasons for changing the law, none support the right of the Commissioner to amend or modify the law as written. It has long been held that the power of the Commissioner to prescribe regulations for the administration of the Federal tax laws is not the power to make law. *Manhattan Co.* v. *Commissioner,* 297 U. S. 129. Neither may a regulation alter, amend, extend or modify the provisions of a statute. *Morrill* v. *Jones,* 106 U. S. 466; *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599.

The Sixth Circuit in the instant case specifically held that the Commissioner was attempting to modify Section 162 (a)(2) of the Code. In this regard the Court stated:

> "* * * while the rule adopted by the Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary".

Also see the case of *Hanson* v. *Commissioner,* 298 F. 2d 391 (C.A. 8th 1962), wherein the Eighth Circuit states at page 397:

> "* * * the overnight rule is merely an arbitrary line drawing having no basis in the statute * * * that is it '* * * more in the nature of legislation than interpretation and accordingly go[es] beyond the rule making power of the Internal Revenue Service'."

Even the Tax Court of the United States, which had previously supported the Commissioner's view, reconsidered its prior decisions in the case of *Bagley* v. *Commissioner, supra,* and made the following pertinent comment at page 183 of its opinion:

> "* * * as the Supreme Court has often said, 'the words of statutes—including revenue acts—should be interpreted where possible in an ordinary, everyday sense'. *Crane* v. *Commissioner,* 369 U. S. 672, 687-688."

The Fifth Circuit in the case of *Williams* v. *Patterson,* 286 F. 2d 333 (C.A. 5th 1961), likewise held the

Commissioner's interpretation was a change in the law and in so holding stated at page 335:

> "* * * Second, we note particularly that there is no language in the statute limiting its application to 'expenses incurred while * * * away from home *overnight.*' The 'overnight' gloss was dreamed up by the department. Third, there is nothing in the statute indicating any Congressional intent that 'away from home' means either overnight or away from home for a period substantially longer than an ordinary working day, or that it means 'a trip on which the taxpayer's duties [in his released time] required him to obtain necessary sleep away from his home terminal'."

Other cases which have repudiated the Commissioner's interpretation as being beyond the rule making powers granted by Congress are *U. S.* v. *Morelano,* 356 F. 2d 199 (C.A. 8th 1965); *Chandler* v. *Commissioner,* 226 F. 2d 467 (C.A. 1st 1955); *Scott* v. *Kelm,* 110 F. Supp. 819 (D.C. Minn. 1953); *Ahrens* v. *U. S.,* 264 F. Supp. 518 (D.C. Ill. 1967).

The only Court to agree that the Commissioner has the authority to modify the code section was the First Circuit in the case of *Commissioner* v. *Bagley,* 374 F. 2d 204 (C.A. 1st 1967). The respondent submits that the First Circuit completely ignored the important separation of functions of the legislative, executive and judicial branches of our government. Under this decision, the Commissioner could amend, modify, or extend any statute so long as it was allegedly done for administrative purposes. While all must agree that

the Commissioner has the power to prescribe rules and regulations, no rule or regulation which is inconsistent with the statute or amends the plain meaning of such statute falls within the definition of rules and regulations interpreting the law.

The respondent submits that the Commissioner's overnight or sleep or rest rule is an amendment, extension and modification of Section 162 (a) (2) of the Code and beyond the powers granted by Congress.

III. The Costs of Meals Incurred on a Business Trip Are Not Personal Expenses But Are Deductible as Business Expenses.

The key to the deduction of meals expense is whether such expenses are business induced. Note that the government never attempts to argue that the cost of such meals are not related to the respondent's business. In fact the government avoids discussing the business relationship entirely.

The principal argument, if not the sole argument, of the Commissioner in support of his position is that, without the overnight rule, a businessman on a one day business trip realizes a tax break that is not available to a daily commuter. As stated above this argument completely ignores the fact that such meals are required by the exigencies of business. Actually, however, there is a tremendous difference between a daily commuter and a salesman traveling away from home in the pursuit of business.

Theoretically, if not as a practical matter, a commuter has the choice of eating downtown or returning

home for any given meal. Most men eat their noon meal in town rather than at home as a matter of personal convenience. Even in those cases where the commuter's home is too far away from his office to enable him to return home for the noon meal, the location of his home was still a personal choice of the daily commuter. On the other hand, when a salesman is traveling on the road in the pursuit of his business he has no choice but to eat his meals in a restaurant located in a distant city or town. Thus, the expense of these meals is directly related to the salesman's business and is a deductible item for that reason. The Sixth Circuit recognized this point in the *Correll* case:

> "The theory of Section 162 (a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an expense incurred in producing income. The Commissioner's 'overnight' or 'sleep or rest' rules bear no rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute * * *"

The Commissioner is apparently obsessed with the idea that a taxpayer who travels away from home on business for one day may realize a tax benefit not afforded the daily commuter. But how does the Commissioner's overnight rule affect a salesman such as the

respondent whose daily routine in no way resembles a commuter. How many commuters are required by their employers to arise each morning at 4:30 A.M., drive fifty miles in order to be in their territory at the beginning of the business day and eat breakfast and lunch at a particular restaurant where his employer can reach him by telephone if necessary. Yet, under the Commissioner's rule, the respondent, who does the above, would not be permitted to deduct the cost of his breakfast or noon meals under the theory that this would discriminate against the daily commuter.

The respondent submits that the facts in the instant case establish beyond any doubt that the Commissioner's rule is arbitrary and defeats the Congressional intent to permit a businessman to deduct the cost of meals while away from home in the pursuit of his business.

The overnight rule is arbitrary in many ways. Why should the respondent be forced to spend the night in Athens, Tennessee, or Sweetwater, Tennessee, before he can deduct the cost of his meals. As stated previously, the cost of these meals is no greater if the respondent spends the night than if he returns home to his family. In fact, does this not discriminate against those taxpayers who would prefer to come home each night to be with their family rather than to stay in a motel in a distant city. If any discrimination exists, it would appear to be between businessmen who travel away from home rather than between businessmen who travel away from home and the daily commuter.

The legislative history in no way supports the Commissioner's view. It must be remembered that the highly publicized case of *Hanson* v. *Commissioner, supra,* was decided on January 16, 1962. It is very unlikely that the decision in this case escaped the attention of Congress. In fact, the government admits on page 25 of its brief that the Treasury brought this problem to the attention of Congress in 1963. Despite these facts, Congress has yet to change Section 162 (a) (2) of the Code to clarify what the Commissioner contends is a major problem in tax regulation.

In its brief, the government places great weight on the fact that during a Senate hearing in 1954 on new Code Section 62 (2) (c) the phrase "while away from home overnight" was used by the Committee in describing the prior law as to deductibility of transportation expenses. Inasmuch as Congress has not been heard from since making that now infamous statement, is it not more logical to assume that the statement was a slip of the tongue rather than an express statement of the law under Section 162 (a) (2) which was not even under consideration. See S. Rep. No. 1622, 83rd Cong. 2d Sess. p. 9. Note that in the very next paragraph the committee refers to "while away from home" without mentioning overnight.

Surely if Congress intended to adopt the Commissioner's rule some action would have been taken by now, especially in view of the numerous cases holding against the Commissioner and the urgings of the Commissioner to change the wording of Section 162 (a) (2) of the Code.

It must be remembered that prior to 1924, only the amount which the cost of a meal exceeded the cost of the same meal if eaten at home was deductible. However, Congress changed this rule by permitting the taxpayer to deduct the entire amount expended for meals incurred on a business trip. If any further limitation was intended what better opportunity could Congress have had to limit the deduction if that was considered necessary. See H. Rep. No. 350, 67th Cong., 1st Sess. p. 11; S. Rep. No. 275, 67th Cong. 1st Sess. p. 14.

The government contends that the Commissioner has consistently interpreted the statute as allowing a deduction for the cost of meals only when the trip required sleep or rest. Note however, that such interpretation is still not a part of the substantive provision—Sec. 1.162-2, Income Tax Regs., relating to traveling expenses. This point is cleverly ignored by the government throughout its brief.

On page 20 of its brief, the government also points out that it is well established that congressional review and re-enactment of a tax statute after being informed of the Commissioner's interpretation provides persuasive evidence of congressional approval. Since in the instant case Congress was made aware of the decision in *Hanson* v. *Commissioner, supra,* in 1963, does this not more clearly indicate that Congress, by failing to amend the wording of the code section, gave its tacit approval to the respondents' interpretation of the phrase "while away from home":

As shown above the legislative history is rather sparse and sheds little light on the question before the Court. Moreover, it is well settled that legislative history is nothing more than an aid to be used by the Courts in reaching a decision and, when not illuminating, should be given little weight, if any, in arriving at a decision.

CONCLUSION.

The judgment of the Court of Appeals for the Sixth Circuit should be sustained.

Respectfully submitted,

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281-403—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 113

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

This case presents essentially a question of sound tax administration.

Congress has expressly given to the Secretary or his delegate the power to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. 7805(a). The practical, narrow issue here is whether the Commissioner of Internal Revenue may use this statutory authority to interpret the phrase "away from home" in this situation. The Commissioner's problem is to implement the interacting congressional policies that allow deductions for business travel expenses, 26 U.S.C. 162(a)(2), while denying deductions for "personal, living, or family"

expenses, 26 U.S.C. 262, and to do it in a way that is clear and capable of efficient administration. It is not material that the courts might have chosen a different rule than the Commissioner has, were the question one of first impression. Unless it is shown to be unreasonable and arbitrary, the Commissioner's long-continued interpretation should be upheld.

I.

The deduction respondent has claimed is, in the statutory language, for "traveling expenses (including amounts expended for meals and lodging * * *) while away from home"; his conclusion (Br. 10–11)[1] that the Commissioner has no authority to interpret these words turns on his claim that the last three words—"away from home"—are so plain and unambiguous as to be obvious in their meaning (Br. 3–5).

Clearly though, there is an inescapable question of construction. It has, for example, long been established that a commuter is not "away from home" when he leaves his residence and travels to his office. See *Commissioner* v. *Flowers,* 326 U.S. 465, 473. Indeed, in *Flowers* and in two other cases this Court has had occasion to construe this supposedly "clear" statute. *Peurifoy* v. *Commissioner,* 358 U.S. 59, and *Commissioner* v. *Stidger,* 386 U.S. 287.

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[1] "Br." refers to respondent's brief. "Ch. Br." refers to the *amicus* brief of the Manufacturing Chemists Association. "Sm. Br." refers to the *amicus* brief of the Bureau of Salesman's National Association.

The difficulties are further apparent when respondent's arguments are examined in detail. Though respondent urges the "plain" meaning of this statute, he never says what this is except to say that the Court should look to the "plain, ordinary and popular" meaning of the statutory words (Br. 5). The very concept of "traveling," though, requires a physical separation from home; anyone who is "traveling" is thus by definition away from his home. Respondent himself seems to perceive that such an approach would make the phrase "away from home" redundant and add nothing to the statutory word "traveling". See *Commissioner* v. *Bagley,* 374 F. 2d 204, 207 (C.A. 1). Thus, he variously suggests that the language encompasses only those who travel beyond their "own home town" (Br. 7), or outside "the greater * * * metropolitan area" where they reside (Br. 8).

Nor are these the only possible interpretations of the statutory language. Thus, each *amicus* suggests that a traveler is "away from home" when he has traveled "a substantial distance" (Ch. Br. 6; Sm. Br. 7–8). One of them would apparently accept as a reasonable alternative the Commissioner's "sleep-or-rest" rule (Sm. Br. 6–7), and add that a traveler is also "away from home" if he "spends a substantial time away from his principal post of duty" (Sm. Br. 11)—making the test of substantiality whether the traveler eats "more than one meal outside the general area of his home" (Sm. Br. 8).

In none of the briefs opposing the Commissioner's position are we told why the Commissioner is not free to make a reasonable choice among the varied sug-

gested readings of the statute. Nor are we told in any way whether or how any of these alternative interpretations properly reflects the fact that Congress has also provided in Section 262 that "no deduction shall be allowed for personal, living or family expenses." The principal effect of these conflicting suggestions and explanations is to illustrate the need for the Commissioner to articulate an administrable interpretation that adequately fulfills the several Congressional objectives.

II.

The remaining question is whether the Commissioner's "sleep-or-rest" rule is a reasonable implementation of the congressional purposes. One *amicus* apparently concedes that, at least for some purposes, it is (Sm. Br. 6–7). Respondent and the other *amicus* charge, however, that the test is unreasonable—each doing so on a ground that contradicts the other's analysis.

The Commissioner's rule is based on two premises: (1) Section 162(a)(2) should be construed to allow deductions in those circumstances where business travel will, in the general case, be expected to result in expenses significantly larger than the usual "personal, living, or family" costs that Section 262 makes nondeductible; while at the same time (2) providing equal treatment of those who are in economic positions similar to the commuter or local traveler, whose expenses all agree are not deductible because of the specific prohibition of Section 262.

Respondent apparently would concede (see Br. 6)

that allowing him a deduction would favor him over commuters and intra-city travelers. But he asserts that in Section 162(a)(2) Congress may have intentionally granted a tax "windfall" to those who, like most taxpayers, leave their residences in the morning and return there at night, but, who, unlike most, happen to cross the boundaries of their home towns or their metropolitan areas during the work day (Br. 6). No explanation is given for this reading of the legislative purpose; nor is recognition given to the contrary legislative history.[2] In result, respondent would have the deduction, while his fellow salesmen whose routes were within their home towns are denied tax relief, even though their work schedules and economic situation are no different than his.

The *amicus* Manufacturing Chemists Association, on the other hand, has "no doubt that equality of treatment is a fundamental goal of our system of taxation * * *" (Ch. Br. 6). This *amicus* bases its disagreement with the Commissioner on the unsubstantiated assertion that "Experience by those who travel considerable distances such as a one-day jet trip between New York and Chicago indicates that the expenses for meals significantly exceed the costs of comparable meals by those who remain at their home base." (Ch. Br. 7.)[3]

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[2] The legislative history discussed in our opening brief, at pp. 11–12, shows that enactment of the first predecessor of Section 162(a)(2) resulted from the Commissioner's concern with the need to grant deductions for meal and lodging expenses that exceed those ordinarily incurred when not traveling.

[3] In contrast, the other *amicus* asserts (Sm. Br. 7 n. 10) that the Commissioner's rule is unreasonable because those who re-

As this illustration and the variety of rules that are said to be superior to the Commissioner's indicate, the possible variations are legion—distance traveled, time away, method of transportation, number of meals, home arrangements that do or do not involve duplication of costs, and so on. Somehow the line must be drawn, in a practical and workable way, between deductible travel expenses and nondeductible "personal, living, or family expenses". This is precisely the sort of determination that Congress intended to be made by the Commissioner on the basis of his experience and expertise.

The courts have repeatedly recognized the validity of the premises from which the sleep-or-rest rule has been derived. As the Fourth Circuit has said, the traveling expense statute was enacted because Congress "recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business". *Barnhill* v. *Commissioner,* 148 F. 2d 913, 917. Expenses of daily life do not increase significantly because a taxpayer eats one or two meals away from his residence, for comparable restaurant expenses are incurred by many—if not most—commuters, intra-city travelers and others not entitled to the deduction. It is when a taxpayer's travel requires a stop for sleep or rest that "continuing costs incurred at a permanent place of abode are duplicated". *James* v. *United States,* 308 F. 2d 204, 206 (C.A. 9);

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ceive free meals on airplanes—*i.e.*, those whose living expenses are reduced by jet travel—are allowed to deduct the entire air fare without eliminating the value of the meals.

see also *Verner* v. *Commissioner*, 39 T.C. 749, 754. It is only at this point that there are, generally speaking, the appreciable expenses above the usual "personal, living, or family expenses" that caused Congress to allow a deduction for meals and lodging while "traveling * * * away from home." See note 2, *supra*.

Consequently, by basing his rule on the need for sleep or rest, the Commissioner has implemented the congressional purpose of allowing deductions "only when * * * business forced the taxpayer to travel *and to live* temporarily at some place other than" his business headquarters. *Commissioner* v. *Flowers*, *supra*, at p. 474. [Emphasis supplied.] At the same time the Commissioner has properly avoided discrimination against those who "do not work in a mobile office." *Williams* v. *Patterson*, 286 F. 2d 333, 337, n. 10 (C.A. 5).

Otherwise, the line would be drawn against the one- or two-meal commuter or the intra-city traveler, but in favor of persons who travel across a municipal or metropolitan boundary in the same business day who would be allowed deductions for all work day meal costs. Though there may be differences, they are slight, and they are more than overcome by the desirability of equal treatment among similarly-situated taxpayers. The problem is where to draw the line. The Commissioner, in his "sleep-or-rest" rule, has drawn the line at a point where a real difference does appear, with a consequent maximizing of equality of treatment among taxpayers.

Moreover, the Commissioner's rule is clear and

readily capable of administration. Whatever the rule, there will be some cases that some court would have preferred to resolve in a different way. But this is the sort of matter on which there should be a rule that is capable of being administered by revenue agents and applied as a matter of course by taxpayers.[4] To say, as one *amicus* does (Sm. Br. 7), that "each case must be decided on its own facts and circumstances" is the antithesis of a sound and workable method of administering a deduction provision that affects, often in a small way, the tax liabilities of a multitude of people in widely varying situations.

For from undermining the government's position, the briefs of respondent and *amici curiae*—with their conflicting suggestions for new substitute rules—illustrate the desirability of upholding the Commissioner's long-standing interpretation. All of the suggested new rules would give rise to administrative difficulties or inequity; none of them would distinguish between travelers whose daily living expenses are substantially increased by business travel, on the one hand, and travelers who incur expenses not substantially greater than those incurred by commuters, intra-city travelers and itinerants (who are clearly not entitled to the deduction), on the other.

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[4] Thus, the "sleep-or-rest" rule has enabled the Commissioner to provide an easily applied guide for taxpayers. Instructions based on the rule have been in the annual publication, *Your Federal Income Tax* ever since 1946, and in the instruction pamphlet for Form 1040 since 1948. See our opening brief at pp. 16–17, n. 14–15. Examples of these instructions are set forth in the Appendix to this reply brief.

Congress has entrusted the practical problems of administration of the tax laws to the Commissioner. We suggest that the appropriate judicial function in cases such as this is to determine whether the Commissioner's rule is a reasonable way to construe and administer the statute. The sleep-or-rest rule has been consistently applied to meal expenses for more than a quarter century. It bears on a subject where there is a particular need for an administratively practical solution. Congress was well aware of the rule when it reenacted Section 162(a)(2) in 1954—at a time when the courts had without exception approved the rule in cases such as this one [5]—and thus must be taken to have approved the administrative practice. *Fribourg Nav. Co.* v. *Commissioner*, 383 U.S. 272, 279–280, 283; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 53; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 397; *Helvering* v. *Winmill*, 305 U.S. 79, 83; *United States* v. *Stowe-Woodward, Inc.*, 306 F. 2d 678, 680 (C.A. 1), certiorari denied, 371 U.S. 949; see also *White* v. *Winchester Club*, 315 U.S. 32, 41.[6] This, in brief, is precisely the sort of fair and workable rule that Congress, in enacting 26 U.S.C. 7805(a), expected the Commissioner to

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[5] See our opening brief at p. 16, n. 12. See also that brief at p. 19, n. 16 for a discussion of the differing judicial treatment of transportation expenses.

[6] In light of the Commissioner's consistent position, which the courts accepted, there is no merit to respondent's inference (Br. 14) of congressional acquiescence in the Eighth Circuit's 1962 decision in *Hanson* v. *Commissioner*, 298 F. 2d 391. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533–534; *White* v. *Winchester Club*, 315 U.S. at 40.

adopt. Since it is a reasonable interpretation of the statutory scheme, it should be upheld by the courts.[7]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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NOVEMBER 1967.

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[7] As one *amicus* suggests (Ch. Br. 5–6), our opening brief inadvertently cites (p. 20) three cases as authority for the statement that reenactment of the statute was "persuasive evidence of tacit Congressional approval" of the Commissioner's position, when the cases should have been cited in support of the contention that legislative history is relevant in construing a statute.

APPENDIX

The instruction pamphlets for Income Tax Return Form 1040 for the years 1948 through 1950 (p. 6), 1951 (p. 5), 1952 (pp. 5–6), 1953 (pp. 5–6), and 1954 through 1957 (p. 6), stated substantially as follows:

> The law provides special deductions for the expenses of travel, meals, and lodging while away from home in connection with your employer's business. Traveling "away from home" means going away from the city or town where you normally work and remaining away at least overnight.

The instruction pamphlets for the years 1958 through 1960 (p. 6) stated:

> The law requires that certain employee business expenses be handled differently from other expenses. The rules are as follows:
>
> A. Travel * * * expenses:
>
> * * * * *
>
> (1) Expenses for travel, including the cost of meals and lodging while temporarily away at least overnight* from the city, town or other general area which constitutes your principal or regular business location are deductible as expenses for travel while "away from home."
>
> * * * * *

The instruction pamphlets for the years 1961 and 1962 (p. 4) stated:

> If you are temporarily away on business, at least overnight from the city, town, or other

*In the pamphlet for the year 1958, "overnight" was followed by "but ordinarily for less than a year."

general area which constitutes your principal or regular business location, you can deduct meals and lodging in addition to the travel costs.

The same instruction pamphlets for the years 1963 (p. 4) and 1964 through 1966 (p, 7) stated:

> You may deduct the expenses shown below * * *
>
> * * * * *
>
> (2) *Meals and lodging.*—If you are temporarily away on business, at least overnight from the city, town, or other general area which constitutes your principal or regular business location.

The annually issued booklet entitled "Your Federal Income Tax" has since 1946 referred to the overnight or sleep-or-rest rule. Typical examples are as follows:

(1) The 1946 edition, pp. 89–90:

> Your Federal Income Tax
>
> No. 35
>
> TRAVELING EXPENSE DEDUCTIONS
>
> * * * * *
>
> If a person conducts a regular trade or business in the city in which his permanent home is located but makes occasional business trips to different localities which require his absence overnight, he is considered to be traveling away from home and the full amount of traveling expenses incurred on such trips, including the cost of meals and lodging, is deductible in computing his adjusted gross income. To illustrate, a person who runs a regular business in his home town is called upon to make occasional

trips to Washington, D.C. (from which he does not return the same day), to consult with, give advice, and render other intermittent services to the Federal Government. He may deduct the full amount of his traveling expenses for such trips, even though his stays in Washington, D.C., may be of extended duration. If, however, he makes trips from which he returns to his home by the end of the same day, he is not considered as traveling away from home, regardless of the distance traveled, and while the cost of transportation may be deducted as an ordinary expense of business, the costs of meals and lodging incurred are regarded as in the nature of personal living expenses and therefore are not deductible in computing his adjusted gross income.

* * * * *

(2) The 1955 edition, p. 16:

CHAPTER 9. EXPENSES OF EMPLOYEES

Certain expenses incurred by employees in connection with their work are deductible on their income tax returns.

* * * * *

TRAVEL AND TRANSPORTATION

Expenses of travel, meals and lodging while "away from home" in connection with your duties are deductible in arriving at adjusted gross income and should be deducted from your compensation when that amount is entered on page 1 of Form 1040. "Away from home" means going away from the city or town where you normally work and remaining away at least overnight.

* * * * *

(3) The 1959 edition, pp. 42, 43:

15. TRAVELING AND TRANSPORTATION

Traveling and transportation expenses are deductible if they are ordinary and necessary to your business or job

You may deduct your traveling and transportation expenses (defined later) which are ordinary and necessary to your business or employment.

* * * * *

TRAVELING EXPENSES

To the average person traveling expenses include almost any expense involved in the movement of a person from one place to another. However, for tax purposes traveling expenses has a more restrictive meaning.

Traveling expenses are the reasonable and necessary expenses of traveling away *from* home overnight in pursuit of your business or employment and include the cost of meals and lodging.

* * * * *

You are away from home overnight if your duties require you to be away from the general area of your tax home for a period which is substantially longer than an ordinary day's work and of sufficient length to necessitate relief from duty to obtain sleep. You need not be away from your tax home for an entire 24-hour day or throughout the hours from dusk to dawn so long as your relief from duty during your absence is to obtain necessary sleep, and not merely to relax or eat.

Example 1.—You work for a trucking company. You leave your terminal station at 6 p.m. and return there 15 hours later. You are released at your turn-around point for 2 hours in

order that you may eat. Since you are not released from duty at your turn-around point to obtain necessary sleep, you are not away from home overnight.

Example 2.—You work for a bus line. You leave your terminal station at 8 a.m. and return about 16 hours later. At your turn-around point you are released for 4 hours for necessary sleep. Since you are released for necessary sleep before returning to your home terminal, you are away from home overnight.

* * * * *

(4) The 1963 edition, pp. 48, 49:

TRAVELING EXPENSES

* * * * *

Traveling expenses and transportation expenses are very similar. Both include the fares charged for travel by air, rail, bus, taxi, etc., and the cost of operating and maintaining your automobile. For tax purposes they are distinguished in that traveling expenses are the reasonable and necessary expenses of traveling away from home overnight in pursuit of your business or employment and include the cost of meals and lodging. Transportation expenses do not include the cost of meals and lodging but transportation expenses are deductible to the extent they are directly attributable to the actual conduct of your business or employment. The important thing is to determine the location of your tax home, and whether you are traveling away from that home overnight, to distinguish between traveling and transportation. Transportation expenses are discussed in more detail later in this chapter.

* * * * *

You are away from home overnight if your duties require you to be away from the general area of your tax home for a period which is substantially longer than an ordinary day's work

and that when away, during released time, it is reasonable for you to need and to obtain sleep or rest in order to meet the requirements of your employment or business or demands of your employment. You need not be away from your tax home for an entire 24-hour day or throughout the hours from dusk to dawn so long as your relief from duty during your absence is to obtain necessary sleep, and not merely to relax or eat.

Example 1.—A railroad conductor leaves his home terminal on a regularly scheduled round-trip run between two cities and returns home 16 hours later. During the run, he is released for 6 hours at his turn-around point where he eats two meals and rents a hotel room to obtain necessary sleep before starting the return trip. He is considered to be away from home overnight.

Example 2.—A truckdriver leaves his terminal and returns 12 hours later. He is released at his turn-around point for 2 hours in order to eat. Since he is not released to obtain necessary sleep, he is not away from home overnight.

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SUPREME COURT OF THE UNITED STATES

No. 113.—October Term, 1967.

United States, Petitioner, v. Homer O. Correll et ux.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 11, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

The Commissioner of Internal Revenue has long maintained that a taxpayer traveling on business may deduct the cost of his meals only if his trip requires him to stop for sleep or rest. The question presented here is the validity of that rule.

The respondent in this case was a traveling salesman for a wholesale grocery company in Tennessee.[1] He customarily left home early in the morning, ate breakfast and lunch on the road, and returned home in time for dinner. In his income tax return for 1960 and 1961, he deducted the cost of his morning and noon meals as "traveling expenses" incurred in the pursuit of his business "while away from home" under § 162 (a)(2) of the Internal Revenue Code of 1954.[2] Because the respondent's daily trips required neither sleep nor rest, the

[1] Since Mr. and Mrs. Correll filed a joint income tax return, both are respondents here. Throughout this opinion, however, the term "respondent" refers only to Mr. Correll.

[2] "(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business . . . ." § 162 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a)(2) (1958 ed.).

Commissioner disallowed the deductions, ruling that the cost of the respondent's meals was a "personal, living" expense under § 262 [3] rather than a travel expense under § 162 (a)(2). The respondent paid the tax, sued for a refund in the District Court, and there received a favorable jury verdict.[4] The Court of Appeals for the Sixth Circuit affirmed, holding that the Commissioner's sleep or rest rule is not "a valid regulation under the present statute." 369 F. 2d 87, 90. In order to resolve a conflict among the circuits on this recurring question of federal income tax administration,[5] we granted certiorari. 388 U. S. 905.

Under § 162 (a)(2), taxpayers "traveling . . . away from home in the pursuit of a trade or business" may deduct the total amount "expended for meals and lodg-

[3] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." § 262 of the Internal Revenue Code of 1954, 26 U. S. C. § 262.

[4] After denying the Government's motion for a directed verdict, the District Judge charged the jury that it would have to "determine under all the facts of this case whether or not" the Commissioner's rule was "an arbitrary regulation as applied to these plaintiffs under the facts in this case." He told the jury to consider whether the meal expenses were "necessary for the employee to properly perform the duties of his work." "Should he have eaten them at his home rather than . . . away from home in order to properly carry on his business or to perform adequately his duties as an employee of this produce company[?]" "You are instructed that the cost of meals while on one-day business trips away from home need not be incurred while on an overnight trip to be deductible, so long as the expense of such meals . . . proximately results from the carrying on the particular business involved and has some reasonable relation to that business." Under these instructions, the jury found for the respondent. The District Court denied the Government's motion for judgment notwithstanding the verdict.

[5] The decision below conflicts with that of the First Circuit in *Commissioner* v. *Bagley*, 374 F. 2d 204, but is in accord with that of the Eighth Circuit in *Hanson* v. *Commissioner*, 298 F. 2d 391, reaffirmed in *United States* v. *Morelan*, 356 F. 2d 199, 208–210.

ing."[6] As a result, even the taxpayer who incurs substantial hotel and restaurant expenses because of the special demands of business travel receives something of a windfall, for at least part of what he spends on meals represents a personal living expense that other taxpayers must bear without receiving any deduction at all.[7] Not surprisingly, therefore, Congress did not extend the special benefits of § 162 (a)(2) to every conceivable situation involving business travel. It made the total cost of meals and lodging deductible only if incurred in the course of travel that takes the taxpayer "away from home." The problem before us involves the meaning of that limiting phrase.

In resolving that problem, the Commissioner has avoided the wasteful litigation and continuing uncer-

[6] Prior to the enactment in 1921 of what is now § 162 (a)(2), the Commissioner had promulgated a regulation allowing a deduction for the cost of meals and lodging away from home, but only to the extent that this cost exceeded "any expenditures ordinarily required for such purposes when at home." Treas. Reg. 45 (1920 ed.), Art. 292, 4 Cum. Bull. 209 (1921). Despite its logical appeal, the regulation proved so difficult to administer that the Treasury Department asked Congress to grant a deduction for the "entire amount" of such meal and lodging expenditures. See Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, in Hearings on H. R. 8245 before the Senate Committee on Finance, 67th Cong., 1st Sess., at 50, 234–235 (1921). Accordingly, § 214 (a)(1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, for the first time included the language that later became § 162 (a)(2). See n. 2, *supra*. The section was amended in a respect not here relevant by the Revenue Act of 1962, § 4 (b), 76 Stat. 960.

[7] Because § 262 makes "personal, living, or family expenses" nondeductible, see n. 3, *supra*, the taxpayer whose business requires no travel cannot ordinarily deduct the cost of the lunch he eats away from home. But the taxpayer who can bring himself within the reach of § 162 (a)(2) may deduct what he spends on his noontime meal although it costs him no more, and relates no more closely to his business, than does the lunch consumed by his less mobile counterpart.

tainty that would inevitably accompany any purely case-by-case approach to the question of whether a particular taxpayer was "away from home" on a particular day.[8] Rather then requiring "every meal-purchasing taxpayer to take pot luck in the courts," [9] the Commissioner has consistently construed travel "away from home" to exclude all trips requiring neither sleep nor rest,[10] regardless of how many cities a given trip may have touched,[11] how many miles it may have covered,[12] or how many hours it may have consumed.[13] By so interpreting the statutory phrase, the Commissioner has achieved not only ease and certainty of application but also substantial fairness, for the sleep or rest rule places all one-day travelers on a similar tax footing, rather than discriminating against intracity travelers and commuters, who of course cannot deduct the cost of the meals they eat on the road. See *Commissioner* v. *Flowers*, 326 U. S. 465.

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[8] Such was the approach of the Tax Court in *Bagley* v. *Commissioner*, 46 T. C. 176, 183, vacated, 374 F. 2d 204, of the Eighth Circuit in *Hanson* v. *Commissioner*, 298 F. 2d 391, 397, and evidently of the Sixth Circuit in this case, see 369 F. 2d 87, 90.

[9] *Commissioner* v. *Bagley*, 374 F. 2d 204, 207.

[10] The Commissioner's interpretation, first expressed in a 1940 ruling, I. T. 3395, 1940–2 Cum. Bull. 64, was originally known as the overnight rule. See *Commissioner* v. *Bagley*, *supra*, at 205.

[11] The respondent lived in Fountain City, Tennessee, some 45 miles from his employer's place of business in Morristown. His territory included restaurants in the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, La Follette, and Jellico, all in eastern Tennessee.

[12] The respondent seldom traveled farther than 55 miles from his home, but he ordinarily drove a total of 150 to 175 miles daily.

[13] The respondent's employer required him to be in his sales territory at the start of the business day. To do so, he had to leave Fountain City at about 5 a. m. He usually finished his daily schedule by 4 p. m., transmitted his orders to Morristown, and returned home by 5:30 p. m.

Any rule in this area must make some rather arbitrary distinctions,[14] but at least the sleep or rest rule avoids the obvious inequity of permitting the New Yorker who makes a quick trip to Washington and back, missing neither his breakfast nor his dinner at home, to deduct the cost of his lunch merely because he covers more miles than the salesman who travels locally and must finance all his meals without the help of the Federal Treasury.[15] And the Commissioner's rule surely makes more sense than one which would allow the respondent in this case to deduct the cost of his breakfast and lunch simply because he spends a greater percentage of his time at the wheel than the commuter who eats breakfast on his way to work and lunch a block from his office.

The Court of Appeals nonetheless found in the "plain language of the statute" an insuperable obstacle to the Commissioner's construction. 369 F. 2d 87, 89. We disagree. The language of the statute—"meals and lodging . . . away from home"—is obviously not self-defining.[16]

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[14] The rules proposed by the respondent and by the two *amici curiae* filing briefs on his behalf are not exceptional in this regard. Thus, for example, the respondent suggests that § 162 (a) (2) be construed to cover those taxpayers who travel outside their "own home town," or outside "the greater . . . metropolitan area" where they reside. One *amicus* stresses the number of "hours spent and miles traveled away from the taxpayer's principal post of duty," suggesting that some emphasis should also be placed upon the number of meals consumed by the taxpayer "outside the general area of his home."

[15] See *Amoroso* v. *Commissioner*, 193 F. 2d 583.

[16] The statute applies to the meal and lodging expenses of taxpayers "traveling . . . away from home." The very concept of "traveling" obviously requires a physical separation from one's house. To read the phrase "away from home" as broadly as a completely literal approach might permit would thus render the phrase completely redundant. But of course the words of the statute have never been so woodenly construed. The commuter, for example, has never been regarded as "away from home" within the

And to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position, for the statute speaks of "meals and lodging" as a unit, suggesting—at least arguably—that Congress contemplated a deduction for the cost of meals only where the travel in question involves lodging as well.[17] Ordinarily, at least, only the taxpayer who finds it necessary to stop for sleep or rest incurs significantly higher living expenses as a direct result of his business travel,[18] and Congress might well have thought that only taxpayers in that category should be permitted to deduct their living expenses while on the road.[19] In any event, Congress certainly recognized,

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meaning of § 162 (a) (2) simply because he has traveled from his residence to his place of business. See *Commissioner* v. *Flowers*, 326 U. S. 465, 473. More than a dictionary is thus required to understand the provision here involved, and no appeal to the "plain language" of the section can obviate the need for further statutory construction.

[17] See *Commissioner* v. *Bagley*, 374 F. 2d 204, 207, n. 10.

[18] The taxpayer must ordinarily "maintain a home for his family at his own expense even when he is absent on business," *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917, and if he is required to stop for sleep or rest, "continuing costs incurred at a permanent place of abode are duplicated." *James* v. *United States*, 308 F. 2d 204, 206. The same taxpayer, however, is unlikely to incur substantially increased living expenses as a result of business travel, however far he may go, so long as he does not find it necessary to stop for lodging. One *amicus curiae* brief filed in this case asserts that "those who travel considerable distances such as [on] a one-day jet trip between New York and Chicago" spend more for "comparable meals [than] those who remain at their home base" and urges that all who travel "substantial distances" should therefore be permitted to deduct the entire cost of their meals. It may be that eating at a restaurant costs more than eating at home, but it cannot seriously be suggested that a taxpayer's bill at a restaurant mysteriously reflects the distance he has traveled to get there.

[19] The court below thought that "[i]n an era of supersonic travel, the time factor is hardly relevant to the question of whether or

when it promulgated § 162 (a)(2), that the Commissioner had so understood its statutory predecessor.[20] This case thus comes within the settled principle that

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not . . . meal expenses are related to the taxpayer's business . . . ." 369 F. 2d 87, 89–90. But that completely misses the point. The benefits of § 162 (a)(2) are limited to business travel "away from home," and *all* meal expenses incurred in the course of such travel are deductible, however unrelated they may be to the taxpayer's income-producing activity. To ask that the definition of "away from home" be responsive to the business necessity of the taxpayer's meals is to demand the impossible.

[20] In considering the proposed 1954 Code, Congress heard a taxpayer plea for a change in the rule disallowing deductions for meal expenses on one-day trips. Hearings on General Revision of the Internal Revenue Code before the House Committee on Ways and Means, 83d Cong., 1st Sess., pt. 1, at 216–219 (1953); Hearings on H. R. 8300 before the Senate Committee on Finance, 83d Cong., 2d Sess., pt. 4, at 2396 (1954). No such change resulted.

In recommending § 62 (2)(C) of the 1954 Code, permitting employees to deduct certain transportation expenses in computing adjusted gross income, the Senate Finance Committee stated:

"At present, business transportation expenses can be deducted by an employee in arriving at adjusted gross income only if they are reimbursed by the employer or if they incurred while he was *away from home overnight* . . . .

"Because these expenses, when incurred, usually are substantial, it appears desirable to treat employees in this respect like self-employed persons. For this reason both the House and your committee's bill permit employees to deduct business transportation expenses in arriving at adjusted gross income even though the expenses are not incurred in travel *away from home* or not reimbursed by the employer . . . ." S. Rep. No. 1622, 83d Cong., 2d Sess., 9 (1945) (emphasis added). See also H. R. Rep. No. 1337, 83d Cong., 2d Sess., 9 (1954).

And in discussing § 120 of the 1954 Code (repealed by 72 Stat. 1607 (1958)), which allowed policemen to exclude from taxable income up to $5 per day in meal allowances, both the House and Senate Reports noted that, under the prevailing rule, police officers could deduct expenses *over* the $5 limit of § 120 "for meals while *away from home overnight*." H. R. Rep. No. 1337, 83d Cong., 2d Sess., A40 (1954) (emphasis added); S. Rep. No. 1622, 83d Cong.,

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Fribourg Nav. Co.* v. *Commissioner*, 383 U. S. 272, 283.

Alternatives to the Commissioner's sleep or rest rule are of course available.[21] Improvements might be imagined.[22] But we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U. S. C. § 7805 (a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." *Commissioner* v. *Stidger*, 386 U. S. 287, 296. The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner. Because the rule challenged here has not been shown deficient on that score, the Court of Appeals should have sustained its validity. The judgment is therefore

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

2d Sess., 191 (1964) (emphasis added). Thus Congress was well aware of the Commissioner's rule when it retained in § 162 (a) (2) the precise terminology it had used in 1921.

[21] See n. 14, *supra*.

[22] See, *e. g.*, the 1963 proposal of the Treasury Department, in Hearings on the President's 1963 Tax Message before the House Committee on Ways and Means, 88th Cong., 1st Sess., pt. 1, at 98 (1963).

SUPREME COURT OF THE UNITED STATES

No. 113.—October Term, 1967.

United States, Petitioner, *v.* Homer O. Correll et ux.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 11, 1967.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Fortas concur, dissenting.

The statutory words "while away from home," 26 U. S. C. § 162 (a)(2), may not in my view be shrunken to "overnight" by administrative construction or regulations. "Overnight" injects a time element in testing deductibility, while the statute speaks only in terms of geography. As stated by the Court of Appeals:

> "In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute." *Correll* v. *United States*, 369 F. 2d 87, 89–90.

I would affirm the judgment below.